INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

APPLICATION FOR REVIEW OF JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

DEMANDE DE RÉFORMATION DU JUGEMENT N° 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

2

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APPLICATION FOR REVIEW OF JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

DEMANDE DE RÉFORMATION DU JUGEMENT Nº 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

4

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DEMANDE DE RÉFORMATION DU JUGEMENT Nº 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

6

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The present volume reproduces the Request for opinion, the dossier transmitted by the Secretary-General of the United Nations, the written statements and comments, and the correspondence in the case concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.* This case, entered on the Court's General List on 10 September 1984 under number 72, was the subject of an Advisory Opinion delivered on 27 May 1987 (*Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 18).

The Hague, 1990.

Le présent volume reproduit la requête pour avis consultatif, le dossier transmis par le Secrétaire général des Nations Unies, les exposés écrits et observations écrites et la correspondance concernant l'affaire de la *Demande de réformation du jugement nº 333 du Tribunal administratif des Nations Unies.* Cette affaire, inscrite au rôle général de la Cour sous le numéro 72 le 10 septembre 1984, a fait l'objet d'un avis consultatif rendu le 27 mai 1987 (*Demande de réformation du jugement nº 333 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1987*, p. 18).

La Haye, 1990.

READEX FICHE

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REQUEST FOR ADVISORY OPINION

REQUÊTE POUR AVIS CONSULTATIF

THE SECRETARY-GENERAL OF THE UNITED NATIONS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

28 August 1984.

Sir,

I have the honour to refer to Article 11 of the Statute of the United Nations Administrative Tribunal (resolution 957 of 8 November 1955) whereby the General Assembly of the United Nations established a Committee on Applications for Review of Administrative Tribunal Judgements and authorized it, under paragraph 2 of Article 96 of the Charter, to request advisory opinions of the International Court of Justice.

The twenty-fourth session of the Committee on Applications for Review of Administrative Tribunal Judgements opened at United Nations Headquarters on 20 August 1984. The purpose of the session was to consider, *inter alia*, an application from Mr. Vladimir Victorovich Yakimetz (doc. A/AC.86/R.117) for a review of Judgement No. 333 delivered by the United Nations Administrative Tribunal on 8 June 1984 (doc. AT/DEC/333). At a closed meeting on 23 August 1984 the Committee, having taken a separate decision in respect of each of the four grounds invoked by the Applicant under Article 11 of the Statute of the Administrative Tribunal, decided to request an advisory opinion of the International Court of Justice regarding Tribunal Judgement No. 333.

The decision of the Committee, as formally announced by its Chairman at an open meeting of the Committee on 28 August 1984, reads as follows :

> "The Committee on Applications for Review of Administrative Tribunal Judgements at the 4th meeting of its twenty-fourth session on 23 August 1984 decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions :
>
> '(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983 ?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations ?' "

I am enclosing herewith one copy each, duly certified, of the English and French texts of the document of the Committee (A/AC.86/R.121) containing its decision.

Pursuant to the Committee's rules of procedure (A/AC.86/2/Rev.3 and Corr.1 (English only)), a verbatim record of the open meeting of the Committee

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on 28 August 1984 is being prepared and will be transmitted to the Court as soon as possible.

In accordance with Article 65 of the Statute of the Court, I shall transmit to the Court all documents likely to throw light upon the questions addressed to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements. Furthermore, as required by paragraph 2 of Article 11 of the Statute of the Administrative Tribunal, I shall arrange to transmit any views that Mr. Yakimetz, the person in respect of whom the Tribunal rendered its Judgement No. 333, may wish to submit.

Accept, etc.

(Signed) Javier PÉREZ DE CUÉLLAR.

DOSSIER TRANSMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

DOSSIER TRANSMIS PAR LE SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES

INTRODUCTORY NOTE

1. On 28 August 1984 the Secretary-General informed the President of the International Court of Justice that, by a decision adopted on 23 August 1984 at its 24th session and announced at a public meeting on 28 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee), after having considered an Application from Mr. Vladimir Victorovitch Yakimetz relating to Judgement No. 333 of the Tribunal, requested the Court to give an advisory opinion on the following questions :

> "(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983 ?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations ?"

2. The present dossier contains documents likely to throw light upon these questions. The dossier consists of two parts. Part I contains documents relating to the proceedings leading to the request by the Committee for an advisory opinion of the International Court of Justice, including Judgements of the Administrative Tribunals of the United Nations and the International Labour Organisation that were referred to in such documents. Part II contains documents directly relating to the formulation of paragraph 5 of section IV of General Assembly resolution 37/126, and paragraph 5 of section VI of General Assembly resolution 38/232.

3. The documents, which constitute part of the Official Records of the General Assembly, of the Committee, of the Administrative Tribunal of the United Nations, as well as of the Secretariat of the United Nations and of the Administrative Tribunal of the International Labour Organisation, have been certified to be so or to be true copies or translations thereof. Each document is identified by title and official United Nations symbol, if any. Whenever possible, a citation is also given to the volume where the document may be found in the *Official Records* of the United Nations. In addition all documents have, for convenience of use, been numbered consecutively in the order in which they appear in the dossier and references to documents in this Introductory Note are based as closely as possible on this system of numbering.

Part I of the Dossier. Documents relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 333 of the United Nations Administrative Tribunal

A. Documents of the Twenty-fourth Session of the Committee

4. On 21 June 1984 Mr. Vladimir Victorovitch Yakimetz presented an Application (doc. No. 1) for a review of Judgement No. 333 rendered on 8 June 1984 by the Administrative Tribunal in the case of *Yakimetz against the*

Secretary-General of the United Nations (see Section B below). The twenty-fourth session of the Committee was thereupon convened to consider, *inter alia*, that Application (docs. Nos. 2 and 3). On 10 August 1984 the Secretary-General presented his comments on the Application submitted by Mr. Yakimetz (doc. No. 4).

5. The Committee met on 21, 22 and 23 August 1984 and considered the application presented by Mr. Yakimetz in closed meetings and, having considered an informal draft proposal of the United Kingdom of Great Britain and Northern Ireland (doc. No. 5), decided to submit two questions to the Court (docs. Nos. 6 and 7). According to the Rules of the Committee (doc. No. 10), no records were kept of the closed meetings but verbatim records (doc. No. 8) are available of the public meeting held on 28 August 1984 at which the Committee adopted its decision on the application of Mr. Yakimetz and announced the text of the questions to be addressed to the Court ; the results of and the participants in the votes taken during the private deliberations were also formally announced by the Chairman at that meeting, and six members of the Committee made statements for the record.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee at Its Twenty-fourth Session

6. The Tribunal's Judgement, delivered on 8 June 1984, in the case of *Yakimetz against the Secretary-General of the United Nations* is contained in document No. 9.

7. The rules of procedure that governed the twenty-fourth session of the Committee were the rules adopted at its twenty-second session (doc. No. 10). Earlier, the Rules of Procedure of the Committee were the provisional rules it had adopted at its first meeting, on 16 October 1956, and amended at its meetings on 25 October 1956, 21 January 1957 and 11 December 1974. At its twenty-second session the Committee considered (doc. No. 11) the Advisory Opinion in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325) in which the Court expressed concern about certain procedures followed by the Committee in considering that application ; as a result, the Committee amended its Rules of Procedure and adopted them in definitive form (doc. No. 10).

8. Portions of two General Assembly resolutions were referred to in the documents considered by the Committee, i.e., paragraph 5 of section IV of resolution 37/126 (doc. No. 12) and paragraph 5 of section VI of resolution 38/232 (doc. No. 13). Two documents relating to change of visa status were referred to in the documents considered by the Committee, i.e., a 1953 report of the Fifth Committee on Personnel Policy (doc. No. 14) and a 1954 Information Circular addressed to Members of the Staff (doc. No. 15).

9. The Statute and Rules of the United Nations Administrative Tribunal were those in effect from 3 October 1972 (doc. No. 16). The Statute and Rules have not been changed from the version considered by the Court in the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325), and with the exception of the addition of Article 26 of the Rules, are also identical to the version considered in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166).

10. The Staff Regulations are set out in the dossier (doc. No. 17) in the version in force as of 1 January 1983 and the "100 Series" of Staff Rules (doc. No. 18) in the version in force as of 1 January 1984 (doc. No. 18), but all provisions

relevant to the Application are unchanged from those in force at the time of Mr. Yakimetz's separation.

C. Documents[1] *Submitted to the United Nations Administrative Tribunal : Case No. 322 : Yakimetz against the Secretary-General of the United Nations*

11. Mr. Yakimetz filed an Application with the Administrative Tribunal on 3 January 1984 (doc. No. 19), together with 42 annexes (doc. No. 20). The Secretary-General filed the Respondent's Answer on 14 March 1984 (doc. No. 21). Mr. Yakimetz filed observations (together with three Annexes) on the Respondent's Answer on 13 April 1984 (doc. No. 22).

D. Administrative Tribunals Judgements Cited in the Documents Submitted to the Committee or to the United Nations Administrative Tribunal or in Its Judgement No. 333

1. Judgements of the United Nations Administrative Tribunal (UNAT)

12. UNAT Judgement No. 142 *(Bhattacharyya)* (doc. No. 23) was referred to in document No. 9, paragraph VI (Judgement No. 333) and document No. 19, paragraph 69 (Applicant's Statement of Facts and Arguments).

13. UNAT Judgement No. 205 *(El-Naggar)* (doc. No. 24) was referred to in document No. 9, paragraph VI (Judgement No. 333), document No. 21, paragraph 15 (Answer of Respondent) and document No. 22, paragraph 4 (Observations on the Answer of the Respondent).

14. UNAT Judgement No. 310 *(Estabial)* (doc. No. 25) was referred to in document No. 1, paragraph 23 (Application to Committee), document No. 9, page 8 (Judgement No. 333) and document No. 19, paragraphs 32, 60 and 75 (Applicant's Statement of Facts and Arguments).

15. UNAT Judgement No. 326 *(Fischman)* (doc. No. 26) was referred to in document No. 1, paragraph 41 (Application to Committee), document No. 4, paragraph 18 (Comments of Secretary-General on Application), document No. 8, page 12, statement of representative of United States of America (*Verbatim Record* of the Fifth Meeting of Committee) and document No. 9, paragraph XII and paragraph 12, footnote *(a)*, of the dissenting opinion (Judgement No. 333).

16. UNAT Judgement No. 92 *(Higgins)* (doc. No. 27) was referred to in document No. 1, paragraphs 35, 36 and 38 (Application to Committee), document No. 4, paragraph 25 (Comments of Secretary-General on Application), document No. 9, paragraph IV, and in the Statement by President Endre Ustor and in paragraph 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 34, 44 and 54 (Applicant's Statement of Facts and Arguments), document No. 21, paragraphs 9 and 21 (Answer of Respondent) and in document No. 22, paragraph 14 (Observations on the Answer of the Respondent).

17. UNAT Judgement No.192 *(Levcik)* (doc. No. 28) was referred to in document No. 1, paragraphs 20, 31, 35, 36, 38 and 39 (Application to Committee),

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[1] In these documents, which were submitted to the United Nations Administrative Tribunal, Mr. Yakimetz is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". These documents are noted in the opening paragraphs of Judgement No. 333 of the Tribunal (doc. No. 9) and constitute the written submissions made to the Administrative Tribunal in the case.

document No. 4, paragraph 25 (Comments of Secretary-General on Application), document No. 9, paragraph IV, and in the statement by President Endre Ustor and in paragraph 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 36, 41, 44, 54, 56, 58 and 67 (Applicant's Statement of Facts and Arguments) and in document No. 21, paragraph 9 (Answer of Respondent).

18. UNAT Judgement No. 54 *(Mauch)* (doc. No. 29) was referred to in document No. 9, paragraph XIX and in paragraph 4 of the dissenting opinion (Judgement No. 333) and in document No. 22, paragraph 15 (Observations on the Answer of the Respondent).

19. UNAT Judgement No. 181 *(Nath)* (doc. No. 30) was referred to in document No. 21, paragraph 14 (Answer of Respondent) and in document No. 22, paragraph 4 (Observations on the Answer of the Respondent).

20. UNAT Judgement No. 140 *(Seraphides)* (doc. No. 31) was referred to in document No. 21, paragraph 14 (Answer of Respondent) and in document No. 22, paragraph 4 (Observations on the Answer of Respondent).

21. UNAT Judgement No. 95 *(Sikand)* (doc. No. 32) was referred to in document No. 19, paragraph 69 (Applicant's Statement of Facts and Arguments).

22. UNAT Judgement No. 249 *(Smith)* (doc. 33) was referred to in document No. 9, paragraph 2 of the dissenting opinion (Judgement No. 333).

2. A Judgment of the International Labour Organisation Administrative Tribunal (ILOAT)

23. ILOAT Judgment No. 431 *(In re Rosescu)* (doc. No. 34) was referred to in document No. 1, paragraphs 35, 37 and 39 (Application to Committee), document No. 4, paragraphs 25 and 26 (Comments of the Secretary-General on Application), document No. 9, paragraph XIX and in paragraphs 4 and 9 of the dissenting opinion (Judgement No. 333), document No. 19, paragraphs 54, 57 and 58 (Applicant's Statement of Facts and Arguments) and in document No. 21, paragraphs 25 and 26 (Answer of Respondent).

Part II of the Dossier. Documents directly relating to the Formulation of Paragraph 5 of Section IV of General Assembly resolution 37/126 of 17 December 1982 and of Paragraph 5 of Section VI of General Assembly resolution 38/232 of 20 December 1983

A. Paragraph 5 of Section IV of General Assembly Resolution 37/126

1. Documents of the Thirty-fifth Session of the General Assembly

24. At its 35th session, the General Assembly, by paragraphs 1 and 2 of Section IV of resolution 35/210 (doc. No. 35), requested the International Civil Service Commission (ICSC) and the Joint Inspection Unit (JIU) to study further and submit reports on the subjects of the concepts of career, types of appointment, career development and related questions and invited them to co-operate in the drafting of those two reports[1].

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[1] These two reports were to be the basis for discussion of these subjects at the thirty-seventh session and therefore earlier references to these questions throughout the years are not included in the dossier because they throw no light on the interpretation of paragraph 5 of section IV of resolution 37/126, which was adopted as a result of these and later reports, all of which are included in the dossier.

2. Documents of the Thirty-sixth Session of the General Assembly

25. In response to paragraphs 1 and 2 of section IV of General Assembly resolution 35/210, the JIU submitted a report on the personnel policy options : career concept, career development and types of appointment (docs. Nos. 36 and 37). The Secretary-General submitted comments on this report (doc. No. 38). The ICSC submitted a report, which, *inter alia*, dealt in a preliminary way with this matter (doc. No. 39, para. 17 and Annex I). The Staff Unions and Associations of the United Nations Secretariat submitted a report which dealt, *inter alia*, with this matter (doc. No. 40, paras. 96 to 98 and 101 to 106).

26. The Fifth Committee considered these reports under agenda items 107 : Personnel Questions, and 108 : Report of the International Civil Service Commission. Summary of the discussion may be found in the reports of the Fifth Committee on agenda items 107 (doc. No. 41) and 108 (doc. No. 42). On the basis of the recommendations of the Fifth Committee on agenda items 107 and 108 the General Assembly on 18 December 1981 respectively adopted resolution 36/233 (doc. No. 43) and decision 36/457 (doc. No. 44), by which it decided to discuss at its thirty-seventh session the subjects of concept of career, types of appointment, career development and related questions[1].

3. Documents of the Thirty-seventh Session of the General Assembly

27. At the 37th session of the General Assembly, the Fifth Committee had before it the eighth annual report of the ICSC (doc. No. 45), a note by the Secretary-General transmitting the comments by the Federation of International Civil Servants' Associations (FICSA) (doc. No. 46), a note by the Secretary-General transmitting the JIU's second report on the career concept (doc. No. 47) and the comments of the Administrative Committee on Co-ordination (doc. No. 48). The report of the ICSC as a whole was considered by the Fifth Committee under agenda item 112 ("Report of the International Civil Service Commission") and the portions dealing with its study on the concepts of career, type of appointment, career development and related questions were also considered by that Committee under agenda item 111 ("Personnel Questions"). The Fifth Committee considered item 112 at its 28th, 29th, 31st, 35th, 36th, 40th, 42nd, 43rd, 44th, 63rd, 64th and 67th meetings and item 111 at its 23rd, 25th, 26th, 27th, 28th, 30th, 31st, 32nd, 33rd, 34th, 36th, 37th, 38th, 40th, 41st, 43rd, 47th, 49th, 53rd, 56th, 58th, 63rd, 65th and 70th meetings. However, only the following meetings are relevant to paragraph 5 to section IV of resolution 37/126 : 23rd meeting (doc. No. 49, paras. 10 and 11), 26th meeting (doc. No. 50, paras. 25 and 30), 27th meeting (doc. No. 51, paras. 15 and 16), 28th meeting (doc. No. 52, paras. 37, 38, 43, 44 and 45), 29th meeting (doc. No. 53, para. 42), 30th meeting (doc. No. 54, para. 47), 31st meeting (doc. No. 55, paras. 2, 14, 24, 30, 42 and 52), 33rd meeting (doc. No. 56, paras. 13 and 14),

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[1] The Fifth Committee had considered item 107 at its 35th, 36th, 40th, 41st, 43rd, 45th, 49th to 55th, 59th to 61st, 65th, 67th, 68th, 71st to 73rd and 75th meetings and item 108 at its 31st, 34th to 36th, 38th, 40th, 43rd, 45th, 49th, 51st, 53rd, 61st, 68th and 81st meetings. These discussions did not deal with the substance of the reports on concept of career, types of appointment, career development and related questions submitted to it but referred primarily to the question of co-ordination between the JIU and the ICSC in the preparation by the ICSC of its substantive report to be submitted to the thirty-seventh session of the General Assembly. These records are not included in the dossier as they throw no light on the questions submitted to the Court.

34th meeting (doc. No. 57, paras. 44, 50 and 61), 36th meeting (doc. No. 58, paras. 12, 29 and 30), 37th meeting (doc. No. 59, paras. 3 and 14), 40th meeting (doc. No. 60, paras. 4, 60 to 62, 77 and 96), 43rd meeting (doc. No. 61, paras. 13, 17 and 48), 44th meeting (doc. No. 62, paras. 15 to 16), 63rd meeting (doc. No. 63, para. 15) and 67th meeting (doc. No. 64, paras. 7 to 10).

28. A draft resolution sponsored by Canada, Finland, Ghana, Norway, Pakistan, Panama and Sweden (doc. No. 65) was considered by the Fifth Committee, together with several amendments having no bearing on paragraph 5 of section IV of resolution 37/126 (doc. No. 66, para. 4). At its 67th meeting, on 13 December 1982, the Fifth Committee adopted the draft resolution as amended (doc. No. 66, para. 5). The General Assembly considered the report of the Fifth Committee (doc. No. 66) at its 109th meeting, on 17 December 1982, and adopted the draft resolution without any debate (doc. No. 67, pp. 26 to 27).

B. Paragraph 5 of Section VI of General Assembly Resolution 38/232

Documents of the Thirty-eighth Session of the General Assembly

29. At the 38th session of the General Assembly, the Fifth Committee had before it the ninth annual report of the ICSC (doc. No. 68). The Fifth Committee considered this report under agenda item 117 ("United Nations Common System") at its 28th, 31st, 33rd, 38th, 41st, 42nd, 49th, 50th, 61st, 62nd, 65th and 67th meetings. Comments made in the course of the discussion on the subject relevant to paragraph 5 of section VI of General Assembly resolution 38/232 are reflected in the summary records of the 31st meeting (doc. No. 69, para. 56), 33rd meeting (doc. No. 70, para. 35), 38th meeting (doc. No. 71, para. 73), 42nd meeting (doc. No. 72, para. 12), 61st meeting (doc. No. 73, para. 8) and 66th meeting (doc. No. 74, paras. 38 and 41).

30. At the 61st meeting of the Fifth Committee, on 12 December 1983, the representative of Canada introduced a draft resolution sponsored by Australia, Austria, Canada, Denmark, Egypt, Norway, Pakistan, Sweden and Venezuela (doc. No. 75). Several amendments to the draft resolution were submitted, none having any bearing on paragraph 5 of section VI of resolution 38/232. At its 66th meeting, on 15 December 1983, the Committee adopted the draft resolution as amended (doc. No. 76, para. 12). The General Assembly considered the report of the Fifth Committee (doc. No. 76) at its 104th meeting, on 20 December 1983, and adopted the draft resolution without any debate (doc. No. 77, pp. 32 to 33).

CONTENTS OF THE DOSSIER

Part I of the Dossier. Documentation relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 333 of the United Nations Administrative Tribunal

A. Documents of the Twenty-fourth Session of the Committee on Applications for Review of Administrative Tribunal Judgements

A/AC.86/R.117
23 July 1984.

1. Application of Mr. Vladimir Victorovitch Yakimetz dated 21 June 1984

APPLICATION

The Applicant, Vladimir Victorovitch Yakimetz, in respect of whom Judgement No. 333 was rendered by the United Nations Administrative Tribunal, hereby makes application to the Committee to request an advisory opinion of the International Court of Justice on the following grounds :

I. *The Tribunal has exceeded its jurisdiction and competence.* Paragraphs 1-5.

(a) The Tribunal has no competence to widen the discretionary powers of the Secretary-General, to diminish the contractual rights of staff members, or to substitute its own judgement for that of the General Assembly.

(b) The majority Judgement sanctions the Secretary-General's denial to the Applicant of reasonable consideration for a career appointment, as mandated in General Assembly resolution 37/126, paragraph IV.5. This has the effect of increasing the discretionary authority of the Secretary-General, a discretion specifically abridged by the General Assembly, and denying the Applicant his contractual right.

II. *The Tribunal has failed to exercise jurisdiction vested in it.* Paragraphs 6-16.

(a) The Applicant sought the right to be considered for a career appointment, a right granted him by General Assembly resolution 37/126, by virtue of his six years of continuing good service. The Respondent denied him this right, under the impression that a legal impediment existed in his case and that he could not be treated like "most staff members with comparable service records" ; because his last contract was concluded on the basis of secondment.

Since there was no question of an extension of secondment, the Applicant requested the Tribunal to determine whether a legal impediment existed to his further employment.

(b) Only the dissenting opinion addressed this threshold question. The majority Judgement failed to examine it. The Tribunal has therefore failed to exercise the jurisdiction vested in it.

III. *The majority Judgement of the Tribunal errs on questions of law relating to provisions of the Charter* Paragraphs 17-33.

(a) The Judgement conflicts with Article 101.1.
(b) The Judgement conflicts with Article 100.1.
(c) The Judgement conflicts with Article 101.3.
(d) The Judgement conflicts with Article 8.
(e) The Judgement conflicts with Article 2.1.

IV. *The Tribunal has committed fundamental errors of procedure which have resulted in a miscarriage of justice.* Paragraphs 34-43.

(a) The Tribunal has departed from its own previously enunciated principles and doctrine, and those of the ILO Tribunal.
(b) The Tribunal has interposed, *sua sponte* and with prejudice, issues outside the scope of the case before it.

I. The Tribunal Has Exceeded its Jurisdiction and Competence

1. The Tribunal is competent to pass judgement upon applications alleging non-observance of contracts of employment of Secretariat staff members, or of their terms of appointment, which include all pertinent regulations and rules in force at the time as well as the provisions of the Charter. It has no competence to widen the discretionary powers of the Secretary-General, to diminish the contractual rights of staff members, or to substitute its own judgement for that of the General Assembly.

2. General Assembly resolution 37/126, paragraph IV.5, followed by resolution 38/232, VI, 5, conferred certain rights on fixed-term staff members who, "upon completion of five years of continuing good service *shall be given* every reasonable consideration for a career appointment" (emphasis added). The choice of "shall be" rather than "may be", means that this provision is mandatory. The General Assembly did not give the Secretary-General discretion to give reasonable consideration to some and not to others. As the dissenting opinion points out, the International Civil Service Commission specifically considered the case of staff on secondment, and did not exclude them from this right. In the absence of any provision to the contrary, it may be assumed that the General Assembly intended the normal machinery for considerning candidates to be employed, viz. the Appointment and Promotion Bodies.

3. All three opinions agree that the Applicant was not afforded every reasonable consideration. The majority judgement expresses its "dissatisfaction" at the failure of the Respondent to record that he had given every reasonable consideration; the concurring statement says he was not eligible for such consideration; and the dissenting opinion says he was illegally denied his right.

4. Paragraph XVIII of the Judgement states that "the Respondent had the sole authority to decide . . . whether the Applicant could be given a career appointment". The majority, therefore, widens the Secretary-General's discretionary powers to decide which fixed-term staff shall and which shall not be considered for a career appointment—a discretion that was abridged by the mandatory term used in resolution 37/126. The majority denies the right of the Applicant, after six years of continuing good service, to reasonable consideration, thus altering and diminishing his contractual rights.

5. The majority Judgement, therefore, encroaches upon the powers of the General Assembly, and retroactively curtails the Applicant's terms of appointment. The Tribunal has neither the jurisdiction nor the competence to do so.

II. The Tribunal Has Failed to Exercise Jurisdiction Vested in It

6. The Applicant served a total of 11 years under three fixed-term contracts at the United Nations. His first fixed-term contract was from 1966 to 1974, his second was from 1977 to 1982, and his third was from December 1982 to December 1983. All the P-11 application forms filled in by him for these contracts were submitted to the United Nations by the USSR Ministry of Foreign Affairs. Under item 29, which asks "Are you now, or have you ever been, a permanent civil servant in your Government?", he answered "No". Under item 28, which asks "Have you any objections to our making inquiries of your present employer?", he answered "No". His first two Letters of Appointment, under item 5, "*Special Conditions*", carried the notation "None". His third one-year contract, continuous with the second, stated under "*Special Conditions*": "On secondment from the Government of the Union of Soviet Socialist Republics."

7. In February 1983, while this latter contract was in force, he resigned from any positions he might have held in his Government. Although initially barred from entering United Nations premises, he continued to perform his duties without interruption and served out the remainder of his contract in the DC-2 building. Having rendered six years of continuing good service, the Applicant sought the right, in terms of General Assembly resolution 37/126, paragraph IV.5, to reasonable consideration for a career appointment, like any other staff member with an excellent service record. The Respondent denied him the request, under the impression that a legal impediment existed in his case and that he could not be treated like "most staff members with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service" (Judgement, p. 49, *infra*).

8. Legally the only effect of his resignation was to relieve his Government of any obligation to preserve a post for him with such promotion and retirement benefits as may have accrued. Neither the Respondent nor the Tribunal maintained that his resignation constituted any violation of his contract with the United Nations. Since he no longer had an employment relationship with any releasing organization there could have been no question whatsoever in the mind of the Applicant, the Respondent, or the Tribunal of an extension of secondment.

9. The Applicant therefore requested the Tribunal to determine whether any legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983. In other words, did the Respondent err in his belief that having once served under a contract labelled "secondment", the Applicant was thereby permanently disabled from further United Nations service under any other form of contract or appointment. It was well within the Tribunal's jurisdiction to make such a determination.

10. The majority Judgement of the Tribunal completely omits this threshold question from the legal issues to which it addresses itself. Paragraph I of the Judgement lists the issues with which it deals: expectancy, General Assembly resolution 37/126, IV, and "the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship" (an issue not raised by either Applicant or Respondent, and further discussed in section IV *(b), infra*).

11. The majority Judgement finds (para. V) that a fixed-term appointment normally carries no expectancy of renewal or conversion to any other type of appointment. This was never in dispute. In paragraph XII the Judgement concedes that "he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension" if his fixed-

term contract were not based on secondment. The Judgement concludes (para. XIII), that a secondment cannot be modified except with the consent of the three parties involved. The concurring statement goes further and says that a secondment cannot be extended or converted without the consent of the *Government* concerned.

12. The Applicant has no dispute with the statement that a secondment cannot be extended or modified without the consent of the three parties involved. At no time, after 10 February 1983, did he or the Government of the USSR seek an extension or modification of secondment.

13. The majority Judgement examines, and rejects, the Applicant's contention that the contract of employment signed on 9 December 1982 was modified on or after 10 February 1983 by agreement between the parties. On that date he notified the Respondent of a change in his status inconsistent with the "*Special Conditions*". The Respondent, by permitting him to serve out his contract, accepted the modification.

14. But nowhere does the majority Judgement examine the Applicant's status after the expiry of his contract on 26 December 1983. He was clearly not eligible for an extension of secondment, nor would he have consented to one. Any *Special Conditions* in one contract are coterminous with that contract, and have no binding force on either party after the contract has expired. The Applicant contended that no legal impediment existed after that date to his further employment.

15. Only the dissenting opinion examined the central legal issue posed by this appeal, and concluded that since the secondment contract ended on 26 December 1983, and since there was no possibility of further government service, "the only effect of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provisions of Article 101.3 of the Charter . . ."

16. The Tribunal majority has therefore failed to exercise the jurisdiction vested in it.

III. The Majority Decision Errs on Questions of Law relating to Provisions of the Charter

(a) *The Judgement conflicts with Article 101.1*

> "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

17. As the sovereign law-making body of the United Nations, the General Assembly's powers are limited only by the provisions of the Charter and the inviolability of existing contracts of service. It is the Secretary-General's responsibility to embody the resolutions of the General Assembly in rules and administrative instructions of equal application to all. General Assembly resolution 37/126, paragraph IV.5, was a mandate, not a "desideratum". The word used was "*decides*", not "requests" or "recommends". It was the duty of the Respondent to devise and promulgate appropriate machinery to give effect to this mandate, and it was not the responsibility of the Applicant, as paragraphs XV and XVI of the Judgement imply, to draw the Respondent's attention to the resolution in question.

18. Only the dissenting opinion considers whether the Respondent gave due

effect to his Charter obligations in respect of this resolution, and concludes that, due to errors of fact and law, he did not. The majority Judgement concludes, without supporting evidence, that the Respondent himself gave "every reasonable consideration" to the Applicant's candidacy (para. XVI), holds that he had discretionary powers to do so (para. XVIII), and then rebukes him for not stating that he had done so (para. XVIII). The concurring statement exempts him from any responsibility for giving effect to the General Assembly's mandate.

19. The majority Judgement, therefore, is inconsistent with Article 101.1, and an advisory opinion should be sought.

(b) *The Judgement conflicts with Article 100.1*

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization . . ."

20. Only in a secondment may the Secretary-General seek or receive instructions from any government or from any other authority external to the Organization, and then only in requesting the release of the employee. In all other matters relating to promotion, appointment, deployment or separation of staff, the Secretary-General may consider the views of governments, along with other relevant considerations, but may not be bound by them. "In the absence of a secondment agreed to by all the parties concerned . . . the Respondent cannot legally invoke a decision of a government to justify his own action with regard to the employment of a staff member." (*Levcik*, para. 5.) Where the conditions precedent for a secondment are not present, the Secretary-General may not, consistently, with Article 100 of the Charter, seek the consent of an external authority. Among the conditions precedent for a secondment are a continuing relationship of employment between the staff member and the releasing organization, and the consent of the staff member to the arrangement. After his resignation on 10 February 1983 neither of these conditions precedent existed with respect to the Applicant. Therefore a further secondment, or an extension of secondment was out of the question.

21. In his letter of 21 December 1983, the Assistant Secretary-General for Personnel Services wrote that the Applicant could have no expectancy of renewal "without the involvement of all the parties originally concerned". Both the spokesman for the Secretary-General and his Executive Assistant, in statements made to the press and given to the Tribunal, but not referred to in the Judgement, stated that his further employment was impossible without the consent of the USSR Government. Far from finding these statements to be legally erroneous, the majority Judgement endorses them. Paragraph XIII says that the Applicant was under secondment which "could not be modified except with the consent of all three parties". The concurring statement says there could be no extension or conversion to another type of appointment without the consent of the Government concerned.

22. The Tribunal majority makes no attempt to reconcile these views with the express prohibition of Article 100, and therefore an advisory opinion should be sought.

(c) *The Judgement conflicts with Article 101.3*

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

23. It follows from the clear mandate of Article 101.3 that a staff member whose service record has amply demonstrated the qualities of efficiency, competence and integrity, and who has received the unqualified endorsement of his superiors, should not be excluded from consideration by extraneous, secondary or illegitimate factors; a principle frequently upheld by the Tribunal (see, e.g., Judgement No. 310, *Estabial*).

24. Neither the majority Judgement nor the concurring statement give any indication that they have weighed the mandate of Article 101.3 against other factors of lesser paramountcy. The concurring statement, indeed, appears to preclude *a priori* any consideration of competence and efficiency. Clearly implicit in the Tribunal's decision is the notion that the Applicant's resignation from his Government's service is a disabling and prejudicial factor which must be given primacy over the qualities enumerated in Article 101.3. Such a ruling sets an extremely dangerous precedent, one which has no support in the Charter, the Staff Rules and Regulations, or the prior jurisprudence of the Tribunal. Many currently serving staff members have resigned from their government service; many carry passports other than those of the country of their birth: a number have made the transition from secondment to another type of appointment. In the United Nations context the appropriate yardstick for measuring standards of integrity must surely be fidelity to the oath of office and the Charter. Efficiency and competence are unaffected by nationality or visa status.

25. Therefore, the Tribunal's Judgement is inconsistent with Article 101.3, and an advisory opinion should be sought.

(d) *The Judgement conflicts with Article 8*

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

26. The only restrictions on eligibility for appointment permitted by the Charter and the Staff Rules are the standards set out in Article 101.3. The General Assembly placed no restrictions on eligibility for reasonable consideration except five years of continuous good service. The principle of universality, of non-discrimination, is fundamental to the United Nations.

27. The majority Judgement and the concurring statement, however, place a number of restrictions on eligibility, none of them related to efficiency, competence or integrity. Previous contractual status, "expectancy", consent of a government, election to "break ties" are amongst the restrictions raised. The concurring statement flatly denies the Applicant's eligibility for consideration.

28. The inconsistency of these views with the prohibition of Article 8 raises questions of law in which an advisory opinion should be sought.

(e) *The Judgement conflicts with Article 2.1*

> "The Organization is based on the principle of sovereign equality of all its members."

29. No nation, large or small, may claim special treatment for itself or its nationals within the Organization or outside. The General Assembly endorses the principle of equality of States every time it calls for equitable geographical distribution. The principle of equality of States extends, within the Organization, to all conditions of service and all posts, consistent with the principle of merit. No post should be considered the exclusive preserve of any member State or group of States (General Assembly resolution 35/210, para. 1 (3), 1980).

Member States are under an obligation to recognize the exclusively international character of the Secretary-General's responsibility in all staff matters, as set out in Article 100, and to impose no conditions in conflict with this responsibility.

30. Since other staff members have accepted career appointments after resigning from their governments, have changed nationality, have been offered regular appointments after a period of secondment, and since General Assembly resolution 37/126, paragraph IV.5, confers the right to reasonable consideration on *all* staff who have rendered five years of continuous good service under fixed-term contracts, the principle of sovereign equality would demand that no nationality may be either burdened by additional restrictions, or favoured by special treatment.

31. The Tribunal was aware that some Governments "have informed the Secretary-General that they expect to be routinely consulted about the employment of any staff members or certain categories of staff members . . ." and that "with respect to the nationals of some States, the applications are almost always received from the national missions of their Governments. This is the case with respect to most Eastern European countries." (Tribunal Judgement No. 192, *Levcik*, para. IX.) The Tribunal also notes, that in the instant case "evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant. It was suggested to him that he should leave for Moscow early in 1983 for this purpose, but his application for leave was refused by the United Nations" (para. XI, Judgement No. 333).

32. The Tribunal failed to consider the conflict between this evidence and the principle of sovereign equality (or indeed of the principle of non-interference of Art. 100.2). No post should be the exclusive preserve of any member State or group of States. No nation may claim special treatment within the Secretariat, or intervene in the contractual arrangements between a staff member and the United Nations.

33. Therefore, the Judgement raises substantial questions of law as to the applicability of Article 2.1 within the Secretariat, and an advisory opinion should be sought.

IV. The Tribunal Has Committed a Fundamental Error of Procedure Which Has Occasioned a Failure of Justice

(a) *The Tribunal has failed to follow its own precedent*

34. The United Nations Tribunal, the ILO Tribunal, and the other courts of international administrative law have, over the years, built up a body of jurisprudence on which the Administration relies in interpreting its obligations and to which Applicants turn for doctrine and principle when seeking a remedy. In the past, Tribunal judgements have followed their own precedents. New cases have been either reconciled with, or distinguished from, cases that have gone before. To depart from this method constitutes a procedural error amounting to a failure of due process.

35. Two major decisions of the United Nations Tribunal, and one of the ILO Tribunal, have dealt squarely with the legal relationships created by a secondment contract. Judgement No. 92 *(Higgins)* distinguishes three kinds of staff movements: "transfer", "loan" and "secondment". "Transfer" is "the movement of a staff member from one organization to another, with the agreement of both organizations, and the staff member concerned, on the understanding that the releasing organization will be under no obligation to accept his return

to it". "Loan" is "the assignment of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization." Under a "secondment" the staff member is "subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization". *Higgins* concerned an inter-agency secondment. United Nations Tribunal Judgement No. 192 *(Levcik)* and Judgment No. 431 of the ILO Tribunal, *In re Rosescu*, both concerned staff members whose governments refused to consent to contract extensions. In all three cases the Tribunals concerned upheld the rights of the "seconded" staff members, whose consent to the arrangement, they held, was essential. In all three cases they awarded compensation to the injured staff member; in the case of *Higgins*, for prolonged doubts and uncertainties; in the other two cases, for losses suffered due to the non-renewal of their fixed-term contracts.

36. *Higgins* made it clear that the receiving and the releasing organizations cannot vary the terms of a secondment without the consent of the staff member concerned. *Levcik* closely scrutinized the communications and memoranda surrounding the Applicant's appointment and concluded that no valid secondment took place: "The Tribunal does not have to consider the arguments presented by the Applicant regarding either the nature of the legal relationship between a seconded official and his national authorities or the situation arising when that legal relationship ceases to exist during the period of secondment" (para. XVI, Judgement No. 192).

37. The ILO Tribunal in the *Rosescu* case did consider a situation where the legal relationship between the complainant and his national authorities had ceased to exist. Not only did the Tribunal find no duty on the part of the organization to limit the duration of the complainant's services to the period of his initial contract, but also it found no obligation to "defer to the will of the Romanian authorities". Such deference they found to be a misuse of authority.

The relevant paragraph states:

> "The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the member State, which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forgo taking a decision in the organisation's interests for the sole purpose of satisfying a member State. The organisation has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them." (Para. 6, Judgment No. 431.)

38. Judgement No. 333 is a complete departure from this line of precedent, and makes no attempt to reconcile its conclusions with those of previous judgements. The majority Judgement cites *Higgins* and *Levcik* only to define the nature of secondment, not in reference to the rights of the staff member.

The concurring statement requires only the consent of "the Government concerned", with no mention whatsoever of the consent of the staff member. The concurring statement also makes reference to "the circumstances in which he elected to break his ties with his country" (i.e., his resignation), as disqualifying him for career employment. Thus in two sentences, the concurring statement effectively redefines "secondment", making it identical with "loan".

39. *Rosescu* is noted in passing, in paragraph XIX, apparently in the context of the discretionary powers of the Secretary-General, although the criteria used are markedly divergent. The concurring statement refers to "doctrine" developed by the Tribunal which precludes "conversion to any other type of appointment without the consent of the government concerned". As the dissenting opinion points out, no such preclusive agreement can be inferred from *Higgins* or *Levcik* and most certainly not from *Rosescu*.

(b) *The Tribunal has interposed,* sua sponte *and with prejudice, issues outside the scope of the case before it*

40. At no time material to this case was the issue of a change of residence status or citizenship presented. The Applicant did not request permission to waive certain privileges and immunities because the occasion to do so had not arisen during his service, and there is no precedent for permission to sign such a waiver before the expiry of a fixed-term contract. The Respondent did not base his denial of reasonable consideration for a career appointment on a possible future change of citizenship (a change which has not, to the date of this writing, occurred). There is ample precedent for the Appointment and Promotion Board considering a candidate for appointment pending a change of citizenship. The Personnel Data Unit routinely compiles an "Annex to Nationality Statistics : Changes which have occurred in Staff in Posts Subject to Geographical Distribution". Changes of nationality/visa status appear as "Gain" or "Loss" in the appropriate country quota. The Annex for the nine months from 1 July 1983 to 31 March 1984 shows six such changes. The previous year records seven changes; the year before ten; and so on.

The only action of the Applicant of legal consequence to the Tribunal's deliberations was his resignation from any positions he might have held in his national government. Many staff members have at one time or another resigned from government service, an action which is quite consistent with and a normal preliminary to seeking a career appointment.

41. The Tribunal raised the issue of citizenship change *sua sponte*. Paragraph I of the majority Judgement lists it as one of the three legal issues before it. Paragraph XII cites the recently decided *Fischman* case and quotes a "widely held belief" that:

> "International officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations."

The same paragraph goes on to say that in the case of the Applicant "there was apparently no immediate problem" of a waiver. Since there was no immediate problem, the paragraph quoted was irrelevant and prejudicial. The dissenting opinion emphasizes the caution with which the view should be treated. The discussion was in a context of geographical distribution, and the same 1953 Fifth Committee report records that proposals inconsistent with that view were also put forward, one accepted by majority vote.

42. The concurring statement cites this "widely held belief" as though it were legal prohibition on eligibility for consideration, to even more prejudicial effect. The second paragraph of the concurring statement implies that anyone who resigns from a government office is not fit to be an international civil servant. No support for this view can be found in the Charter, the Staff Rules and Regulations, or the practices and procedures of the United Nations, and no previous judgement of the Tribunal has produced a doctrine so restrictive.

43. A deviation from established jurisprudence on which the Applicant has placed reliance, and the introduction of prejudicial elements not properly before them, constitute a failure of justice.

For these reasons the Applicant respectfully asks the Committee to request an advisory opinion of the International Court of Justice.

(Signed) Vladimir YAKIMETZ,
Applicant.

(Signed) Diana BOERNSTEIN,
Counsel for Applicant.

20 July 1984.

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2. Information Circular[1] A/AC.86/INF/23
3. Agenda for the Twenty-fourth session[1] A/AC.86/R.116

A/AC.86/R.118
10 August 1984.

4. Comments of the Secretary-General on Applicant's Written Statement (A/AC.86/R.117)

INTRODUCTION

1. The case before the Committee involves a decision by the Administrative Tribunal upholding the non-renewal by the Secretary-General of the appointment of a staff member whose fixed-term appointment had expired. The Secretary-General, after himself fully considering all the facts of the case, had concluded that offering a new appointment to the staff member would not be in the interests of the United Nations. The Tribunal confirmed that the Secretary-General's decision did not violate the staff member's rights. The Tribunal was unanimous in finding that the Applicant had no expectancy to further employment (Judgement, para. VI; statement by Mr. Endre Ustor, para. 1, and dissenting opinion of Mr. Arnold Kean, para. 1) and, by a majority, held that the Applicant received the consideration for a career appointment that he

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[1] Document not reproduced. *[Note by the Registry.]*

was entitled to pursuant to General Assembly resolution 37/126, section IV, paragraph 5, in which the General Assembly had decided "that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment" (Judgement, paras. XIV-XVIII, and statement by Mr. Endre Ustor, paras. 1 and 3).

2. The staff member has now objected to the Tribunal's Judgement, basing his objection on all four of the grounds set forth in Article 11 of the Tribunal's Statute and asking the Committee to request an advisory opinion of the International Court of Justice on the matter. However, the dispute between the parties is essentially whether the Applicant was given "every reasonable consideration" for a career appointment pursuant to General Assembly resolution 37/126, section IV, paragraph 5. The question of what the General Assembly meant by "every reasonable consideration" in one of its resolutions is not one of the four grounds upon which this Committee can request the International Court of Justice for an advisory opinion.

3. The Respondent submits that there is no basis—much less a substantial basis—for the application on any of the grounds which are now being alleged and further submits that the Administrative Tribunal has properly exercised its jurisdiction and competence, that it has correctly interpreted the applicable provisions of the Charter of the United Nations and that it did not commit an error of procedure which could have occasioned a failure of justice in this case.

I. The Tribunal Properly Exercised Its Jurisdiction and Competence by Hearing the Application and Adjudicating upon the Claim

4. The Applicant alleges that the Tribunal has both exceeded its jurisdiction and competence and, at the same time, has failed to exercise jurisdiction vested in it (see Application, secs. I and II, paras. 1-16).

5. The Respondent has some difficulty in following these inconsistent assertions since the Tribunal is "competent to hear and pass judgement upon applications alleging non-observance of contracts of employment" (see Art. 2 of Tribunal's Statute) and this is precisely what the Tribunal did. The fact that a party disagrees with the judgement of the Tribunal and with its failure to act favourably on his application does not lead to the result that the Tribunal's judgement constituted either a failure to exercise jurisdiction or exceeded that jurisdiction.

6. The Applicant argues that the Tribunal exceeded its jurisdiction because it widened the discretion of the Secretary-General in that it permitted him to ignore General Assembly resolution 37/126, section IV, paragraph 5, of 17 December 1982 regarding "every reasonable consideration" for a career appointment to be given to staff members on fixed-term appointments after five years of continuing good service (Application, sec. I, paras. 2-5).

7. The Respondent submits that the Tribunal might exceed its jurisdiction if it were to consider a case brought by a person other than a staff member or consider a claim based on a ground other than an alleged non-observance of a contract of employment. However, merely deciding a case properly brought before it by a former staff member, whether the decision is favourable or unfavourable, is not an excess of jurisdiction. In any event, the Tribunal did not ignore General Assembly resolution 37/126 but in fact applied it and concluded that the Secretary-General properly exercised his discretion to consider the Applicant for a career appointment (Judgement, paras. XIV-XVIII).

8. The Applicant also argues that the Tribunal failed to exercise its jurisdic-

tion because it did not determine whether there was any legal impediment to his further appointment (Application, sec. II, para. 9).

9. The Respondent submits that while the Tribunal might fail to exercise its jurisdiction by erroneously failing to take a case properly submitted to it, a mere failure to find in favour of the Applicant is not a failure to exercise jurisdiction. In any event, it is clear that the Tribunal did consider the Applicant's argument favourably as it held that the Applicant was entitled to reasonable consideration for a career appointment and that he was in fact given such consideration (Judgement, para. XVIII).

10. The Respondent observes that the International Court of Justice has recently emphasized that the findings of the Tribunal in a decision on the import of Staff Regulations, Staff Rules and General Assembly resolutions do not raise a question of jurisdiction:

> "It can hardly be denied that Mr. Mortished's appeal to the Tribunal, based as it was upon the various provisions of the Staff Regulations and on Rules established by the Secretary-General in pursuance of those Staff Regulations, corresponds directly with both the words and spirit of Article 2 (of the Tribunal's Statute). It is difficult to see any possible ground on which the Tribunal could be said to have exceeded the terms of its jurisdiction or competence thus defined. It sought to interpret and apply the terms of Mr. Mortished's appointment and the relevant Staff Regulations and Rules and General Assembly resolutions . . . Whether or not it was right in its decision is not pertinent to the question of jurisdiction." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion of 20 July 1982, *I.C.J. Reports 1982*, para. 78.)

11. The Respondent submits that it is therefore clear that the Tribunal properly exercised its jurisdiction and competence under Article 2 of its Statute when it heard and passed judgement on the Application in the manner which is reflected in its judgement in this case. It did not refuse to exercise its jurisdiction and, by concluding that the Applicant had no entitlement to further employment, could hardly have exceeded its jurisdiction since this was the matter at issue.

II. The Tribunal Has Correctly Interpreted Applicable Provisions of the Charter

12. In its judgement in the case, the Tribunal found that there was no expectancy for renewal and held that the Secretary-General had the sole authority to decide whether the Applicant should be granted a career appointment and, after examining all the circumstances which the Secretary-General had taken into account, concluded that the Secretary-General properly exercised his discretion when he personally decided in the interest of the Organization not to offer the Applicant a further appointment.

13. The Applicant has alleged that the Secretary-General sought and received instructions from a Government in violation of Article 100, paragraph 1, of the Charter (Application, paras. 20-22), which Article provides as follows:

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

14. The Respondent, however, observes that the Tribunal, in paragraph XIX of its Judgement found, as a fact, that

> "there has been no allegation, and far less any evidence, that the Respondent sought any instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter".

Such a finding of fact by the Tribunal with respect to the Secretary-General's personal decision, taken in conformity with Article 100 of the Charter, is, of course, not a matter which relates to any of the four grounds upon which an opinion of the Court may be sought. Furthermore, the Tribunal emphasized that

> "indeed, he (the Secretary-General) states all throughout that the measures he took were in the interests of the United Nations taking into account all the facts, 'together with the representations to diverse effect by the permanent missions of two Member States'" (Judgement, para. XIX).

15. However, in this context, one member of the Tribunal seems to have formed the impression that the Secretary-General had followed what the member called "a generally accepted rule" that "in the absence of the Government's consent, a seconded staff member must always be refused, *in limine*, a career appointment at the end of his period of secondment" (para. 11 of the dissenting opinion). The Respondent submits that the dissenting member of the Tribunal misunderstood Respondent's position which was, and is, that

> "the decision (now) contested was taken by the Secretary-General after consideration of all the circumstances in the case, including the Applicant's service record, together with the estimation of his supervisors and representations on his behalf by counsel, and the events of 10 February 1983 and thereafter, together with the representations to diverse effect by the permanent missions of two member States"

and that

> "additional consideration thereafter in the Appointment and Promotion Board was not required, and would, moreover, have been manifestly inappropriate in view of the established procedures under staff rule 104.14 *(f)* (i) with respect to proposed appointments" (para. 24 of the Respondent's answer to the Tribunal).

16. The Respondent further submits that, in considering all the circumstances in the case, the Secretary-General was not unduly influenced by the views of one or another government, and certainly did not entertain the belief, as suggested by the dissenting member of the Tribunal, that the Applicant was precluded from consideration for re-appointment, but rather examined the case on all its merits before reaching an independent determination in the interest of the Organization.

17. In addition to his allegation in connection with Article 100 of the Charter, the Applicant cited Article 101 of the Charter in his application to the Tribunal, contending that the Secretary-General was required to re-appoint the Applicant under paragraph 3 of that Article, which provides as follows:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing

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> the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

18. In view of his responsibilities as "Chief Administrative Officer" (Art. 97 of the Charter), the Respondent argued that the Secretary-General was obligated to take into account all the circumstances in the case and that the Secretary-General could not be compelled to exercise his power of appointment under Article 101 of the Charter in a case where the Applicant had no right to re-appointment and the Secretary-General determined that re-appointment would not be in the interest of the Organization. In that connection, the Tribunal noted that the "Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions" (para. XII of the Judgement). Furthermore, the Tribunal noted that one consequence of the Applicant's actions was to raise "the question of his suitability as an international civil servant" citing its Judgement No. 326 in the *Fischman* case and referring to the following statement from a report of the Fifth Committee of the General Assembly:

> "International officials must be true representatives of the cultures and personality of the country of which they were nationals, and those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations (doc. A/2615, para. 70)."

The Tribunal held that the report of the Fifth Committee "must continue to provide an essential guidance in this matter" *(ibid.)*.

19. Finally, in addition to his arguments under Chapter XV of the Charter, the Applicant cites Article 2, paragraph 1, from Chapter I and Article 8 from Chapter III of the Charter, which respectively provide as follows:

> "The Organization is based on the principle of the sovereign equality of all its Members." and
>
> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

20. The Applicant's reference to Article 2, paragraph 1, is entirely misplaced inasmuch as the Judgement of the Tribunal, which is in issue in this case, and the decision of the Secretary-General, which is the subject of that Judgement, have nothing at all to do with the sovereign equality of member States. The Applicant's reference to Article 8 is equally misplaced, since that article refers to sex discrimination, an issue which has never been raised in this case. The essence of the Secretary-General's decision was his determination of the interest of the Organization, and the Tribunal upheld him in that determination with no mention whatsoever of either Article 2, paragraph 1, or Article 8 of the Charter.

21. In view of the foregoing, the Respondent submits that the Tribunal interpreted Articles 97, 100 and 101 of the Charter in the course of its judgement in favour of the Secretary-General who properly discharged his responsibilities as Chief Administrative Officer, under Article 97 or the Charter, without derogating from his responsibilities under Article 100 of the Charter, when he decided not to exercise his power of appointment under Article 101 of the Charter to grant the Applicant a new appointment after his fixed-term appointment on secondment expired.

III. The Tribunal Did not Commit a Fundamental Error of Procedure Which Has Occasioned a Failure of Justice

22. The Applicant alleges that the Tribunal has committed a fundamental error of procedure which has occasioned a failure of justice because it failed to follow an earlier precedent and because it considered an issue not raised by the parties (Application, sec. IV, paras. 34-43).

23. The Respondent observes that these two arguments do not relate to the Tribunal's procedure but relate to questions of substance.

24. Articles 7 to 11 of the rules of the Administrative Tribunal of the United Nations describe the procedure to be followed by the Tribunal in considering appeals. In considering the case, the Tribunal had before it the Applicant's Application, the Respondent's answer and the Applicant's written observations on the Respondent's answer (see pp. 43 and 44, *infra*, of the Judgement). Before pronouncing its judgement, the Tribunal reviewed the requests made by the Applicant in his Application (p. 43, *infra*, of the Judgement), summarized the facts in the case (pp. 43-50, *infra*, of the Judgement), enumerated the principal contentions of the parties (pp. 50 and 51, *infra*), and identified the legal issues involved in the case (para. I of the Judgement). This procedure followed strictly that set out in Articles 7 to 11 of the rules.

25. The Applicant, however, suggests that a fundamental error of procedure was committed because the Tribunal allegedly departs from two earlier Judgements (No. 92: *Higgins* and No. 192: *Levcik*) and departs from a judgment of the Administrative Tribunal of the International Labour Organisation (No. 431: *Rosescu*) (Application, sec. IV, paras. 34-39).

26. The Respondent submits that the Tribunal (Judgement, paras. IV and XIX), in fact, did not consider that it departed from its earlier Judgements and that the Secretary-General's actions did not impinge the principles stated in *Rosescu*. The Respondent considers it appropriate, at this juncture, to note that *Rosescu* was decided by a different Tribunal on different facts in a case where the contested decision of non-renewal occurred after the Executive Head initially decided to grant a new appointment. In any event, the Tribunal is required, under Article 2 of its Statute, to hear and pass judgement on the individual merits of each case before it, in the light of the particular circumstances in which the case is presented.

27. The Applicant also argues that the Tribunal committed a fundamental error of procedure because it dealt with the question of a change in residence status and citizenship, which question was not raised by the parties (Application, sec. IV, paras. 40-43).

28. The Respondent submits that the Tribunal's Statute clearly shows that the Tribunal is not limited to considering the legal arguments adduced by the parties but must consider whether a staff member's contract of employment has not been observed, including "all pertinent regulations and rules" (see Art. 2.1 of the Tribunal's Statute). In other words, the Tribunal must consider a case on the basis of all applicable laws and rules even if the parties failed to refer to some of them. In any event, the Tribunal's reliance on such matters cannot be deemed to be an error, much less "a fundamental error of procedure which occasioned a failure of justice" since the purpose of requiring the Tribunal to consider all matters is to ensure that justice is done and not to do justice merely on the basis of those rules cited by the parties. The parties to a proceeding cannot avoid a proper consideration of all directly pertinent issues by failing to raise them, the Tribunal having the authority and, indeed, the duty to do so on its own initiative.

CONCLUSION

29. In Respondent's submission, no basis exists for concluding that the Tribunal, in upholding the decision of the Secretary-General not to grant a new appointment to the Applicant, exceeded its jurisdiction or competence, failed to exercise its jurisdiction, or erred on a question of relating to provisions of the Charter or committed an error, let alone a fundamental error of procedure which has occasioned a failure of justice.

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5. United Kingdom of Great Britain and Northern Ireland: Informal draft proposal[1] A/AC.86/R.120

A/AC.86/R.121
31 August 1984.

6. Decision of the Committee on the Application of Mr. Yakimetz requesting an Advisory Opinion of the International Court of Justice in Respect of the United Nations Administrative Tribunal Judgement No. 333 *(Yakimetz against the Secretary-General of the United Nations)*

The Committee on Applications for Review of Administrative Tribunal Judgements at the 4th meeting of its twenty-fourth session on 23 August 1984 decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.

Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:

(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?

(2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?

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[1] Document not reproduced. *[Note by the Registry.]*

A/AC.86/30
21 September 1984.

7. Report of the Committee

Rapporteur: Mr. David M. EDWARDS (United Kingdom of Great Britain and Northern Ireland)

INTRODUCTION

1. At its twenty-fourth session, the Committee on Applications for Review of Administrative Tribunal Judgements, established under Article II of the Statute of the United Nations Administrative Tribunal, considered applications for review of the following Administrative Tribunal Judgements:

(a) No. 333—*Yakimetz* v. *Secretary-General of the United Nations*;
(b) No. 331—*Large* v. *United Nations Relief and Works Agency for Palestine Refugees in the Near East*;
(c) No. 326—*Fischman* v. *Secretary-General of the United Nations.*

The Committee also considered but did not accede to a request received from Mr. Zuleidu Jekhine that the time-limit for the submission of an application to the Committee be extended in respect of Administrative Tribunal Judgement No. 319 *(Jekhine* v. *Secretary-General of the United Nations)* rendered on 28 October 1983.

2. Meetings of the Committee were held on 20, 21, 22, 23 and 28 August 1984.

I. Composition of the Committee and Organization of the Session

3. The Committee, under paragraph 4 of Article II of the Statute of the Administrative Tribunal, is composed of the member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly, namely at this time: Algeria, Belgium, Bhutan, Burundi, Canada, China, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Pakistan, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Union of Soviet Socialist Republics and Venezuela.

4. At its meeting on 20 August 1984, the Committee elected the following officers:

Chairman:	Mr. Liés Gastli (Tunisia)
Rapporteur:	Mr. David M. Edwards (United Kingdom).

II. The Applications Before the Committee and Their Consideration

5. On 23 July 1984, the Committee received, through its Secretary, an Application from Mr. Vladimir Yakimetz requesting a review of Judgement No. 333 rendered by the United Nations Administrative Tribunal on 8 June 1984 in the case of *Yakimetz against the Secretary-General of the United Nations*. In accordance with paragraph 1 of Article III of the Rules of Procedure of the

Committee (A/AC.86/2/Rev.3), the Application, which had been submitted in English, was translated into the other languages of the General Assembly. Thereafter, on 6 August 1984, in accordance with the same Rules of Procedure, the Application was communicated in the form of a document (A/AC.86/R.117) to all members of the Committee and to the Secretary-General together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/333).

6. The Secretary-General's written comments, submitted with respect to the Application of Mr. Yakimetz in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 10 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.118).

7. The Committee considered the application of Mr. Yakimetz at three closed meetings held on 21, 22 and 23 August 1984.

8. After members of the Committee had presented their views on the Application of Mr. Yakimetz, the Chairman invited the Committee to decide whether or not there was a substantial basis for the application in respect of each ground set forth in Article II of the Statute of the United Nations Administrative Tribunal. At the request of a member of the Committee, the decisions were taken by a roll-call.

9. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had exceeded its jurisdiction or competence the Committee decided, by a vote of 25 to none with 3 abstentions, that there was not a substantial basis for the Application on that ground. The voting was as follows:

Against: Algeria, Belgium, Bhutan, Burundi, Canada, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Panama, Sierra Leone, Singapore, Sudan, Tunisia, USSR, United Kingdom, United States, Venezuela.
Abstaining: Pakistan, Swaziland, Thailand.
Absent: China.

10. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had failed to exercise jurisdiction vested in it, the Committee decided, by a vote of 16 to 9, with 3 abstentions, that there was a substantial basis for the application on that ground. The voting was as follows:

In favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining: Lebanon, Pakistan, Thailand.
Absent: China.

11. On the question of whether the Application had a substantial basis on the ground that the Tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations, the Committee decided, by a vote of 16 to 9, with 3 abstentions, that there was a substantial basis for the Application on that ground. The voting was as follows:

In favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining: Lebanon, Pakistan, Thailand.
Absent: China.

12. On the question of whether the Application had a substantial basis on the ground that the Administrative Tribunal had committed a fundamental error in procedure which had occasioned a failure of justice, the Committee decided, by a vote of 11 to 13, with 4 abstentions, that there was not a substantial basis for the Application on that ground. The voting was as follows:

In favour: Belgium, Canada, Colombia, France, Japan, Liberia, Norway, Panama, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Guyana, Libyan Arab Jamahiriya, Nepal, Sierra Leone, Singapore, Sudan, Tunisia, USSR.
Abstaining: Lebanon, Pakistan, Swaziland, Thailand.
Absent: China.

13. In the light of the foregoing decisions, the Committee considered, in accordance with paragraph 2 of Article IX of its Rules of Procedure, the formulation of the questions on which it would request an advisory opinion of the International Court of Justice. In this respect, an "informal draft proposal", submitted by the delegation of the United Kingdom and contained in document A/AC.86/R.120, was brought by the Chairman to the attention of the members of the Committee. The Committee adopted, by a roll-call vote of 16 to 9, with 1 abstention, the following decision (A/AC.86/R.121) based on the proposal of the United Kingdom:

> *"Decision of the Committee on the application of Mr. Yakimetz requesting an advisory opinion of the International Court of Justice in respect of the United Nations Administrative Tribunal Judgement No. 333 (Yakimetz against the Secretary-General of the United Nations)*
>
> The Committee on Applications for Review of Administrative Tribunal Judgements, at the 4th meeting of its twenty-fourth session on 23 August 1984, decided that there was a substantial basis, within the meaning of Article II of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:
>
> (1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

14. The results of the vote were as follows:

In favour: Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States, Venezuela.
Against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR.
Abstaining: Pakistan.
Absent: China, Lebanon, Liberia.

15. The aforementioned decisions of the Committee on the Application of Mr. Yakimetz and text of the questions addressed to the International Court of Justice, as well as the results of and the participants in the votes taken during the private deliberations, were in accordance with paragraph 4 of Article VII of the Rules of Procedure of the Committee, formally announced by the Chairman in a public meeting (5th meeting) held on 28 August 1984. At that meeting, the following members of the Committee made statements for the record: Bhutan, Czechoslovakia, France, Panama, United States and USSR. The verbatim record of the 5th meeting of the Committee is contained in document A/AC.86/XXIV/PV.5.

16. On 5 July 1984, the Committee received, through its Secretary, an application from Mr. Robert Large requesting a review of Judgement No. 331 rendered by the United Nations Administrative Tribunal on 28 May 1984 in the case of *Large against the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. In accordance with paragraph 1 of Article III of the Rules of Procedure of the Committee, the application, which had been submitted in hand-written form in English, was translated into the other languages of the General Assembly. Thereafter, on 9 August 1984, in accordance with the same Rules of Procedure, the application was communicated in the form of documents (A/AC.86/R.111 and Corr.1 and Add.1) to all members of the Committee and to the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/331).

17. The written comments of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, submitted with respect to the application of Mr. Large in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 14 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.113).

18. The Committee considered the application of Mr. Large at a closed meeting (6th meeting) on 28 August 1984.

19. The Committee decided unanimously that there was not a substantial basis for the application of Mr. Large under Article II of the Statute of the Administrative Tribunal and concluded that the International Court of Justice should not be requested to give an advisory opinion in respect of Judgement No. 331 delivered by the United Nations Administrative Tribunal in the case of *Large against the United Nations Relief and Works Agency for Palestine Refugees in the Near East*.

20. On 23 July 1984, the Committee received, through its Secretary, an application from Mr. Emilio Fischman requesting a review of Judgement No. 326 rendered by the United Nations Administrative Tribunal on 17 May 1984 in the case *Fischman against the Secretary-General of the United Nations*. In

accordance with paragraph 1 of Article III of the Rules of Procedure of the Committee, the application, which had been submitted in English, was translated into the other languages of the General Assembly. Thereafter, on 6 August 1984, in accordance with the same Rules of Procedure, the application was communicated in the form of a document (A/AC.86/R.114) to all members of the Committee and to the Secretary-General together with a copy of the Judgement of the Administrative Tribunal (AT/DEC/326).

21. The Secretary-General's written comments, submitted with respect to the application of Mr. Fischman in accordance with paragraph 1 of Article IV of the Rules of Procedure of the Committee, were received by the Secretary of the Committee on 10 August 1984 and thereafter duly circulated to all members of the Committee in the form of a document (A/AC.86/R.115).

22. In response to the Committee's request made at its 1st meeting on 20 August 1984, the Secretary of the Committee, on 21 August 1984, presented additional information on the circumstances surrounding the submission of Mr. Fischman's application and, in particular, the date of the receipt of the Tribunal's judgement by Mr. Fischman. This information is contained in document A/AC.86/R.119.

23. The Committee considered the application of Mr. Fischman at a closed meeting (6th meeting) on 28 August 1984.

24. The Committee decided unanimously that there was not a substantial basis for the application of Mr. Fischman under Article 11 of the Statute of the Administrative Tribunal and concluded that the International Court of Justice should not be requested to give an advisory opinion in respect of Judgement No. 326 delivered by the United Nations Administrative Tribunal in the case of *Fischman against the Secretary-General of the United Nations*.

25. In accordance with paragraph 4 of Article VII of the Rules of Procedure of the Committee, the decisions of the Committee on the applications of Mr. Large and Mr. Fischman were formally announced by the Chairman in a public meeting (7th meeting) held on 28 August 1984. At that meeting, the representative of the Sudan made a statement stressing the importance of advance announcement in the *Journal of the United Nations* of open meetings of the Committee held pursuant to the spirit and letter of the Committee's rules of procedure.

A/AC.86/XXIV/PV.5
17 September 1984.

8. Verbatim Record of the 5th Meeting

Held at Headquarters, New York,
on Tuesday, 28 August 1984, at 10.30 a.m.

Chairman: Mr. Gastli (Tunisia)

The meeting was called to order at 11.05 a.m..

The Chairman (interpretation from French): The present public meeting of the Committee on Applications for Review of Administrative Tribunal

Judgements has been convened pursuant to Article VII (4) of the Committee's Rules of Procedure. That paragraph provides that

> "The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record."

The Committee has held four meetings in the course of its present session, and has completed the consideration of one of the applications before it, namely, the Application of Mr. Vladimir Victorovitch Yakimetz, dated 21 June 1984, in which Mr. Yakimetz asks the Committee to request an advisory opinion of the International Court of Justice in respect of United Nations Administrative Tribunal Judgement No. 333. Pursuant to that Application, and in compliance with the provisions of paragraph 1 of Article IX of its Rules of Procedure, the Committee has taken a decision in respect of each of the four grounds invoked by the Applicant under Article 11 of the Statute of the Administrative Tribunal. Each decision was taken by a roll-call vote. The grounds voted upon and the results of the voting were as follows.

(1) Is there a substantial basis for the application on the ground that the Tribunal has exceeded its jurisdiction? There were no votes in favour; 25 members voted against: Algeria, Belgium, Bhutan, Burundi, Canada, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Panama, Sierra Leone, Singapore, Sudan, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United States and Venezuela; three members abstained: Pakistan, Swaziland and Thailand. The Committee thus concluded that there was no substantial basis for the application on the ground just stated.

(2) Is there a substantial basis for the Application on the ground that the Tribunal has failed to exercise jurisdiction vested in it? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the second ground.

(3) Is there a substantial basis for the Application on the ground that the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the third ground.

(4) Is there a substantial basis for the Application on the ground that the Tribunal has committed a fundamental error in procedure which has occasioned

a failure of justice? Eleven members of the Committee voted in favour: Belgium, Canada, Colombia, France, Japan, Liberia, Norway, Panama, the United Kingdom, the United States and Venezuela; 13 members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Guyana, Libyan Arab Jamahiriya, Nepal, Sierra Leone, Singapore, Sudan, Tunisia and the USSR; four members of the Committee abstained: Lebanon, Pakistan, Swaziland and Thailand. There being 11 votes in favour, 13 against, with 4 abstentions, the Committee concluded that there was no substantial basis for the Application on the ground just stated.

Having decided as just described, on the four grounds advanced by the Applicant, the Committee adopted the following decision containing the texts of the questions addressed by it to the International Court of Justice:

> "The Committee on Applications for Review of Administrative Tribunal Judgements at the fourth meeting of its twenty-fourth session on 23 August 1984 in New York decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:
>
> '1. In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> 2. Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?'"

The above decision was adopted by a roll-call vote of 16 votes to 9, with 1 abstention. The pattern of voting was as follows: in favour, Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States, Venezuela; against, Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia, USSR; abstaining, Pakistan.

That is the formal announcement I intended to make this morning in keeping with our Rules of Procedure. Pursuant to Article VII (4) of the Committee's Rules of Procedure, at this public meeting any member of the Committee may make a statement for the record.

I shall now call on those members who wish to exercise that prerogative.

Mr. Tsering (Bhutan): The four questions as contained in Article 11 of the Statute of the United Nations Administrative Tribunal have formed the basis of our deliberations.

On the part of my delegation, in reviewing the case before us, *Yakimetz against the Secretary-General of the United Nations,* I have taken into account all the documents presented to us, namely: document AT/DEC/333, containing the Judgement of the United Nations Administrative Tribunal; document A/AC.86/R.117, which is the Application of Yakimetz; and document A/AC.86/R/118, consisting of the comments of the Secretary-General on the

Applicant's written statement. I have also paid close attention to all of the speakers during our deliberations.

The complexity of the case is reflected in the seeming absence of consensus on it. Some of the speakers concentrated on certain elements of the legal issues of the case and on certain parts of the Judgement of the Administrative Tribunal. This led us to believe that there was agreement on the fundamental issues involved. Elements of the legal issues and parts of the elements do not necessarily represent the case entirely.

In reviewing the case itself and the Judgement of the Tribunal, we must take into account all the relevant issues, large and small, old and new, for this case is crucial—to the Applicant, to the Respondent and in particular for the efficient running of the United Nations Secretariat in the larger interest of the international community.

I want to make it clear that my delegation fully supports the principles and objectives enshrined in the Charter of the United Nations. It is important to us, as it is to many, for the United Nations Secretariat to function free from pressures and to fulfil its responsibilities. As the Secretary-General, in his report on the work of the Organization to the thirty-eighth session of the General Assembly, pointed out:

> ". . . while all profess their dedication to the principles of independent and objective international administration, few refrain from trying to bring pressure to bear in favour of their own particular interests. This is especially so on the personnel side." (A/38/1, p. 5.)

We believe it is in the general interest of the international community to act together, fully aware of the practical difficulties of the enterprise but with the united objective of strengthening the Secretariat and the United Nations system. To this end, within the rules and provisions of the Charter of the United Nations, the Secretary-General should be allowed to exercise his discretion and we should refrain from creating any undesirable precedents in the functioning of the Secretariat.

In the case of Mr. Yakimetz, his contract expired on 26 December 1983. The questions posed by the Applicant and now by certain members of the Review Committee are, "whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983" and "Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

The responses to these questions are fully reflected in the Administrative Tribunal's Judgement. It even referred to the "widely held belief" in a report of the Fifth Committee, which states:

> "International officials should be true representatives of the culture and personality of the country of which they are nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (A/AC.86/R.117, para. 41.)

With regard to the second question, Article 101 (3) of the United Nations Charter provides that

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

Here I wish to underline the words "and integrity" of the individuals.

All these factors are well covered in the Judgement of the Tribunal. I fail to see the need for an opinion on what is already crystal clear.

It is also clear from all the relevant documents before us that the Tribunal did consider the Applicant's arguments and the other relevant issues. The legal issues have been well analysed and presented to us by the Judgement of the Tribunal as a result of the hard work of the members of the Tribunal, who sifted through substantial documentation, facts and available information supplied both by the Applicant and the Respondent. Therefore we find no substantial basis for recommending the case for an advisory opinion of the International Court of Justice. My delegation had no choice but to vote against referring portions of the Tribunal's Judgement to the International Court of Justice for an opinion.

Mr. Rapin (France) (interpretation from French): Mr. Chairman, my delegation also wishes to begin by congratulating you on and thanking you for your most efficient conduct of the Tribunal's work.

With regard to the first question put to the Tribunal, my delegation agrees with the majority of the Committee that Mr. Yakimetz's application is based on grounds that are valid under Article 11 (2) of the Statute of the Administrative Tribunal in claiming that the Tribunal did not answer the question of whether that was a legal impediment to the renewal of the Applicant's employment at the United Nations after the expiry of his contract on 26 December 1983. However, my delegation is inclined to believe that this complaint is grounded not on any failure of the Tribunal to exercise its jurisdiction, but rather on its having committed a fundamental procedural error that gave rise to a failure of justice, under Article 11 (1) of the Statute. We regret that, as had been suggested, the Committee did not agree to accept either of these grounds in support of the application before the Tribunal.

Mr. Agayantz (Union of Soviet Socialist Republics) (interpretation from Russian): At the outset, Mr. Chairman, I should like to congratulate you on and to thank you for your successful and wise guidance of the work of our Committee during this discussion of the extremely complex matter before us.

The Soviet delegation deems it necessary to state its position on the decision taken by the Committee on Applications for Review of Administrative Tribunal Judgements on 23 August 1984. In our view, this decision to request an advisory opinion of the International Court of Justice in respect of Judgement No. 333 of the Administrative Tribunal is absolutely unfounded and artificial. As is known, the Committee took the decision to go to the International Court of Justice on the following two matters.

One is: Has the Administrative Tribunal failed to exercise a jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment of the Applicant in the United Nations after the expiry of his contract on 26 December 1983? The Administrative Tribunal considered the case of the Applicant for consideration, heard it and issued its Judgement—that is, it did not fail to exercise the jurisdiction vested in it. The Judgement of the Administrative Tribunal may give rise to satisfaction or not; but this is not relevant in regard to whether the Tribunal exercised a jurisdiction.

It is worthwhile pointing out that the International Court of Justice in its decision on the *Mortished* case stated: "Whether or not it [the Tribunal] was right in its decision is not pertinent to the question of jurisdiction." That is from paragraph 78 of the advisory opinion of the International Court of Justice of 20 July 1982.

The judgement of the Administrative Tribunal contains a number of very detailed points which show that the Tribunal did consider this question of legal impediments and did give an answer to it.

In paragraph VI of the Judgement, the Administrative Tribunal says, for example:

> ". . . it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (AT/DEC/333, para. VI).

Thus the Administrative Tribunal quite definitely covered the juridical situation of the Applicant after the end of his secondment contract, and that situation was that the Applicant had no legal grounds to expect any further appointment.

Further on, the Administrative Tribunal states:

> "The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions." (Para. XII.)

In that paragraph of its Judgement the Administrative Tribunal considered the question of the Applicant's prospects of being given another contract after the expiry of his secondment contract. The Tribunal stated, in particular, that

> "In so far as he was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment." (Para. XII.)

Hence, in the opinion of the Administrative Tribunal, the actions of the Applicant were an impediment making further service in the United Nations Secretariat difficult.

Still in paragraph XII of the Administrative Tribunal's Judgement, it says: "Another consequence of his actions raised the question of his suitability as an international civil servant." (Para. XII.) The Tribunal explains its evaluation of the suitability of the Applicant as an international civil servant by giving a very unambiguous quotation from a document of the Fifth Committee of the General Assembly—document A/2615, paragraph 70—as follows:

> "International officials should be true representatives of the cultures and personality of the country of which they were nationals, and [that] those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (Para. XII.)

Thus the Tribunal again talks about a circumstance which does not permit the Applicant to expect further service in the United Nations.

Further on in paragraph XII the Administrative Tribunal quotes from Information Circular ST/AFS/SER.A/238, published on instructions from the Secretary-General, relating directly to this question of "suitability" of a candidate for working in the United Nations, as follows:

> "The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of his duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . ." (Para. XII.)

This is further evidence to the effect that the Administrative Tribunal did specifically consider the various aspects of the existence of legal impediments to the further employment of the Applicant in the United Nations after the expiration of his contract on 26 December 1983.

All these circumstances point to a lack of any grounds for submitting to the International Court of Justice the first question contained in the decision of the Committee: that question does not exist.

The second question involved was whether the United Nations Administrative Tribunal had erred on questions of law relating to the provisions of the Charter of the United Nations. We believe that this question too, is unfounded and artificial.

By the terms of Article 97 of the Charter, the Secretary-General is the chief administrative officer of the Organization. It is he who, according to Article 101 (1) of the Charter, appoints Secretariat staff under regulations established by the General Assembly. One of those regulations is to be found in paragraph 5 of Part IV of General Assembly resolution 37/126; the Secretary-General fully complied with the provisions of that paragraph, giving every reasonable consideration to the candidacy of the Applicant, and his decision took account of all the circumstances of the case.

Paragraphs XIV to XVIII of the Judgement of the Administrative Tribunal refer to and evaluate the actions of the Secretary-General. In paragraph XVIII the Tribunal reaffirmed the Secretary-General's sole authority to decide on the appointment of the Applicant, and it deemed that the Secretary-General exercised his discretion properly.

By the terms of Article 100 (1) of the Charter, the Secretary-General and the staff should not seek or receive instructions from any Government or from any other authority external to the Organization. In its Judgement, the Tribunal states that

> "In the present case . . . there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter."

Throughout the consideration of the case, the Secretary-General maintained—and there is no reason to question this—that the measures he took were in the interests of the United Nations taking into account all the facts.

There is no ground for the contention that the Administrative Tribunal did not take account of the provisions of Article 101 (3) of the Charter; the qualities of an international civil servant enumerated in that paragraph were fully taken into account by the Administrative Tribunal, since they were amply enough considered in the material submitted to the Tribunal. In paragraph XII of its decision, the Administrative Tribunal, as we have shown, refers to other qualities required of an international civil servant. The need to take into account qualities other than efficiency, competence and integrity is qualified by the word "paramount" in Article 101 (3) of the Charter.

With respect to Article 2 (1) and to Article 8 of the Charter, which have been referred to in this Committee's discussions, it is perfectly clear that they are not relevant to this case, which has no bearing on the sovereign equality of member States or on questions of discrimination on the basis of sex. References to these provisions, completely inappropriate in the context of this case, once again underscore the insidious nature of the attempts to prove the Administrative

Tribunal's ostensible error on a question of law relating to the provisions of the Charter.

Thus, in the view of my delegation, neither of the two questions raised by the Committee in its decision constitutes grounds for requesting an advisory opinion of the International Court of Justice. Therefore, my delegation, along with many other delegations, voted against that decision.

Since there is a lack of any substantial legal grounds for referring this matter to the International Court of Justice, those who supported such a referral were, we believe, guided by nothing but one-sided political considerations. The political tinge that coloured this issue runs counter to the United Nations Charter, and can only prejudice the effectiveness of the Secretariat and Administration of the United Nations.

Mr. Rosenstock (United States of America): We had not intended to speak at this meeting, since we believe that the decisions taken speak for themselves and were obviously taken on the basis of the very helpful Applicant's brief which was before the Committee and which the Court will have before it, as well as other briefs, which will leave no doubt as to why the broad majority in this Committee took the decision it did.

We believe that the question whether there was a legal bar to further employment is a critical one, one on which the Tribunal erred. It is separate from the question of whether there was any expectation. The separate nature of those questions is obvious, and if it were not in and of itself it would be obvious by the existence of resolution 37/126, which underlines the distinction. There would be no purpose in that resolution if that distinction did not exist.

We concur in the reasoning in the *Mortished* case that questions of this character may be correctly analysed, either in failure of terms to exercise jurisdiction or in terms of a fundamental error of procedure. To those of us from the common-law tradition it appears more clearly to be a failure to exercise jurisdiction. To those from the civil-law tradition the failure apparently amounts more obviously to a procedural error occasioning a denial of justice. We believe both perceptions lead to the same conclusion.

We are also convinced that we are faced here with a course of dealing that leaves little doubt that the Tribunal committed errors of law with regard to interpretation and application of the Charter. Merely to touch on some of the reasoning which led us to participate in the decision that was taken to refer this matter, we believe Articles 100 and 101 of the Charter are directly involved. Article 2 (1) is either directly involved—since we are faced with a course of dealing which must be generalized if Article 2 (1) is to be honoured but which if generalized would be not merely subversive but destructive of the very notion of an international civil service as opposed to some form of inter-governmental collation—or alternatively, as a fundamental principle of the Charter, one which must infuse its meaning to all other relevant articles and certainly is instinct in the wording, object and purpose of Articles 100 and 101.

Now, as we have indicated, is not the time to go into the precise reasons why we believe questions have been raised with regard to Articles 100 and 101 and why the advice of the Court should be sought on those questions. The articles and resolution 37/126 are crucial to the matter. Resolution 37/126, moreover, in our view, is not just some resolution adopted under the Charter-based powers of the Assembly. It is an exceptionally strongly worded text with its use of the word "decides", which goes directly to basic questions relating to the key Charter articles involved and thus ought to have played a central role in the *ratio decidendi* of the Tribunal were errors of law in connection with the Charter to be avoided. To the extent that it was considered at all, we believe it was considered in the context of serious errors of law relating to the resolution, Article 100 and Article 101.

The discretion on the part of the Secretary-General does not mean freedom to act in a manner inconsistent with the plain meaning, object and purpose of the key articles of the Charter.

Dubious quotations from curious aspects of the curiously broadly drafted *Fischman* opinion of the Administrative Tribunal do not obviate the legal obligation to stick within the meaning, letter and spirit of Articles 100 and 101 —even in cases in which discretion is being exercised.

Those are a few of the reasons, in the context of all the matters before us, which led us strongly to support the referral of those questions to the Court. We are confident that the Court will address them in the manner in which they deserve.

Mr. Pavlovsky (Czechoslovakia): I also should like to congratulate you, Mr. Chairman, on the efficient manner in which you have guided this Committee's deliberations.

Our delegation supports the decision of the Committee on Applications for Review of Administrative Tribunal Judgements to dismiss the Applicant's pleas with regard to the Tribunal's Judgement No. 333 as far as they were based on the Applicant's claims that the Tribunal has exceeded its jurisdiction and competence and committed fundamental errors of procedure which have resulted in a miscarriage of justice.

However, we cannot concur in the majority view that an advisory opinion of the International Court of Justice must be sought on questions of the alleged failure of the Tribunal to exercise jurisdiction vested in it and having erred on questions of law relating to provisions of the Charter.

In our delegation's view, the Tribunal properly exercised its jurisdiction and competence by hearing the application and adjudicating upon it. At this juncture, the Czechoslovak delegation fully supports the view of the Respondent in the case that:

> ". . . while the Tribunal might fail to exercise its jurisdiction by erroneously failing to take a case properly submitted to it, a mere failure to find in favour of the Applicant is not a failure to exercise jurisdiction" (A/AC.86/R.118, para. 9).

And the Respondent's view that:

> ". . . the findings of the Tribunal in a decision on the import of Staff Regulations, Staff Rules and General Assembly resolutions do not raise a question of jurisdiction:" (para. 10)—

a view that was developed by the International Court of Justice itself.

Furthermore, the Tribunal could not fail to exercise its jurisdiction by not responding to the question whether a legal impediment existed to further employment of the Applicant by the United Nations after expiry of his contract in the manner in which the Applicant obviously anticipated it, but rather in the manner in which the Tribunal itself considered as being appropriate, taking into account all facts and circumstances of the case.

In paragraph XII of its Judgement No. 333 the Tribunal correctly held that the Applicant "was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions" (AT/DEC/333, para. XII) and pointed out that one of these consequences "raised the question of his suitability as an international civil servant" (para. XII). At this juncture the Tribunal upheld the validity of the report of the Fifth Committee adopted by the General Assembly at its eighth session (A/2615) stating that

> "International officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (Para. XII.)

Moreover, in a broader sense, while the presence of a legal impediment would invalidate an appointment of a staff member by the Secretary-General, the absence of such an impediment does not legally oblige the Secretary-General to proceed with an appointment if he, within his discretionary powers, rightfully considered the Applicant otherwise unsuitable for the international civil service.

The question of a legal impediment in the given case was brought up by the Applicant himself, while the Respondent repeatedly stressed that his decision against reappointment to which the Applicant had no right, was made after taking into account all the circumstances in the case and after determining that reappointment would not be in the interest of the Organization.

Thus the question of a legal impediment could hardly play a central role in the adjudication on the case by the Tribunal since this was not the main matter at issue and in the view of the Czechoslovak delegation does not constitute a substantive basis as regards the Applicant's claim that the Tribunal has failed to exercise its jurisdiction.

The Czechoslovak delegation furthermore strongly believes that the Tribunal has in this case correctly interpreted applicable provisions of the Charter and supports the position of the Respondent contained in his comments on the case.

In addition, with respect to Article 100 (1) of the Charter of the United Nations, it is also the view of the Czechoslovak delegation that the distinction between the obligation of the Secretary-General not to seek or receive instructions from any government or from any other authority external to the Organization, on the one hand, and the legitimate right of any government to convey to the Secretary-General its views on matters relating to its interests, on the other hand, must be preserved. These matters naturally include questions related to the employment of nationals of member States whether or not a staff member or an applicant for employment has chosen to sever relations with his government.

The Czechoslovak delegation does not see any substantive grounds for seeking an advisory opinion of the International Court of Justice as regards the Applicant's claims and believes that the Tribunal's Judgement No. 333 should therefore be sustained.

The Chairman (interpretation from French): As there are no further speakers, I therefore declare closed this public meeting of the Committee under Article VII (4) of the Rules of Procedure.

The meeting rose at 12.15 p.m.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee on Applications for Review of Administrative Tribunal Judgements at its Twenty-fourth Session[1]

AT/DEC/333
8 June 1984.

9. Administrative Tribunal

Judgement No. 333

Case No. 322: YAKIMETZ Against: THE SECRETARY-GENERAL OF THE UNITED NATIONS

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Arnold Kean, Vice-President;

Whereas, on 6 January 1984, Vladimir Victorovitch Yakimetz, a former staff member of the United Nations, filed an application in which he requested the Tribunal:

"A. To consider his case at the Spring, 1984, session of the Tribunal.

B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.

C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.

D. To adjudge and declare that he had an expectancy of further employment.

E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.

F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment.

G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.

H. To order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings.";

Whereas the Respondent filed his answer on 14 March 1984;

Whereas the Applicant filed written observations on 17 April 1984;

Whereas the facts in the case are as follows:

On 20 July 1977, in a letter addressed to the Assistant Secretary-General for Personnel Services, the Deputy Permanent Representative of the USSR to the United Nations recommended the Applicant, a national of the USSR who had been employed by the United Nations in 1969-1974, for a post of reviser (P-4) in the Russian Translation Service of the United Nations; a Personnel History form signed by the Applicant was attached to the letter. On 31 October 1977 the Appointment and Promotion Board recommended, and the Officer-in-Charge of the Office of Personnel Services subsequently approved on behalf of the Secretary-General, the appointment of the Applicant "as a Russian Reviser at the First Officer (P-4) level on a fixed-term secondment basis for a period of five years". On 23 November 1977 the Deputy Chief of the Secretariat Recruitment Service offered to the Applicant, on behalf of the Secretary-General, "a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as Reviser in the Russian Service". On the same day the Secretariat of the United Nations sent a Note Verbale to the Permanent Mission of the USSR to the United Nations informing the Mission that this offer had been made. The letter of appointment, which took effect on 27 December 1977, was issued on behalf of the Secretary-General on 28 December 1977 and accepted by the Applicant on 24 January 1978; it did not mention secondment and, under item 5 ("Special Conditions"), specified "None". On 5 October 1981 the Applicant was transferred as Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs. On 22 October 1982 the Secretariat of the United Nations requested the assistance of the Permanent Mission of the USSR to the United Nations "in securing the consent of its Government to the extension of Mr. Yakimetz's secondment to the United Nations" for one year, that is up to 26 December 1983. On 15 November 1982 the Permanent Mission communicated to the Secretariat of the United Nations "its agreement to the extension of the contract of V. V. Yakimetz . . . up to 26 December 1983". On 6 December 1982 the Applicant was recommended for promotion to P-5. Effective on 27 December 1982 the Applicant's appointment was extended for one year. The letter of appointment, signed on behalf of the Secretary-General on 8 December 1982 and by the Applicant on 9 December 1982, specified under item 5: "On secondment from the Government of the Union of Soviet Socialist Republics." On 8 February 1983 the Assistant Secretary-General for Programme Planning and Co-ordination sent the following memorandum to the Applicant:

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[1] See also, in Part II of the dossier, document No. 35, General Assembly resolution 35/210, and document No. 45, Report of the International Civil Service Commission to the General Assembly, Thirty-seventh Session (A/37/30).

> "Our discussions on your leave schedule for the next few months have prompted me to inform you of my intention to request an extension of your contract after your current contract expires on 26 December 1983. As you know it would be only at the end of 1983 that you would have received full training in all aspects of the biennial programme planning cycle so that, as I had indicated to you last year, I believe that it would be in the interests of the Office to have your services continue.
>
> I would appreciate it if you could let me know at your earliest convenience whether you would be in a position to accept such an extension."

On 9 February 1983 the Applicant applied for asylum in the United States of America. On 10 February 1983 he informed the Permanent Representative of the USSR to the United Nations that he was resigning from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions he held in the Soviet Government and that he had made an application to the Government of the United States of America requesting asylum. On the same day the Applicant notified the Secretary-General, under Staff Rule 104.4 *(c)*, of his intention to acquire permanent resident status in the United States of America; he added:

> "For personal reasons, including my obligations to the United Nations as expressed in Staff Regulations 1.3 and 1.9, I have made an application to the Government of the United States requesting asylum.
>
> I have resigned from all official positions I hold in the Government of the Soviet Union and a copy of my resignation, delivered today to the Soviet Mission to the United Nations, is enclosed.
>
> I wish to [assure] you of my continued dedication and devotion to the United Nations and my wish and intention to continue to perform all my obligations under my employment contract . . ."

On 28 February 1983 the Director of the Division of Personnel Administration informed the Applicant that the Secretary-General had decided to place him on special leave with full pay, effective 1 March 1983 and until further notice, in accordance with Staff Rule 105.2 *(a)*, and that any other decision pertaining to his case would be taken by the Secretary-General at a later stage. On 1 March 1983, in a letter to the Director of the Division of Personnel Administration, the Applicant asked to be advised on the following points:

> "1. I should appreciate being advised of the precise reasons as to why the leave has been granted. I do not consider the mere statement of the language of Rule 105.2 *(a)*, 'for other important reasons', satisfactory to advise me as to why this action has been taken.
>
> 2. What would be the effect of the proposed leave on the following:
>
> *(a)* my free use of any and all United Nations facilities without having to seek permission in each instance;
> *(b)* my continuation as a member of the Appointment and Promotion Committee and as Vice-Chairman of the Third Working Group;
> *(c)* the promotion which is in process for me;
> *(d)* my career development at the United Nations including a possible extension of my present appointment.
>
> I shall look forward to receiving written answers to my questions at your convenience. In the meantime, I shall remain actively at my post."

On 11 March 1983 the Executive Assistant to the Secretary-General informed the Director of the Division of Personnel Administration that the Secretary-General had also decided that the Applicant should not enter the premises of the United Nations until further notice. On the same day the Director of the Division of Personnel Administration answered the questions put by the Applicant on 1 March 1983, as follows:

> "2. As to your request to be advised of the reasons for the decision in question, I wish to point out that in the exercise of his authority and responsibility as the Chief Administrative Officer of the Organization, the Secretary-General has determined that, at this juncture and pending further review, it is in the best interest of the Organization that you do not enter the premises of the United Nations. I would ask you therefore to comply with this decision of the Secretary-General with immediate effect and until further notice. You will be advised in due course of any modification to this instruction.
>
> 3. The above also replies, I believe, to the questions you raised in paragraph 2 *(a)* and *(b)* of your letter. Concerning the recommendation which was made for your promotion, I am sure that the Appointment and Promotion Board will give it due consideration at an appropriate time in

> the course of its proceedings. Finally, as regards your question as to the possible extension of your appointment, I would wish to point out that consideration of this matter at this time would be premature. You may also wish to refer to staff rule 104.12 *(b)* which is applicable to this issue."

On 17 March 1983 the Applicant wrote to the Secretary-General asking for a review under Staff Rule 111.3 *(a)* of the decision to place him on special leave and reiterating his request for a written explanation as to why it was considered in the best interest of the Organization that he did not enter the premises of the United Nations; he added, however, that on the advice of his counsel and under protest, he would of course comply with the Secretary-General's decision. On 29 June 1983 the Applicant was promoted to P-5 with effect from 1 April 1983. On 25 October 1983 he addressed the following memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination:

> "My fixed-term contract with the United Nations is due to expire on 26 December 1983.
>
> As you will recall we have had several discussions on the prospects of my continuing employment in the Office for Programme and Co-ordination. I would like to state once again that I have always considered it to be a special privilege to serve the United Nations. It is my sincere belief that during the eleven years that I have been serving the Organization I have always tried to perform my duties to my fullest, however limited, abilities. I also believe that the intense training in all aspects of programme planning and budgeting in the United Nations that I received over the past two years while working in the Office for Programme Planning and Co-ordination has substantially increased my potential usefulness to the Organization.
>
> In view of the above let me express my hope that you will find it possible on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment."

On 8 November 1983 the Assistant Secretary-General replied:

> "In your memorandum of 25 October 1983 to me you remind that your current contract with the United Nations expires on 26 December 1983.
>
> In this connexion I have recently signed your performance report which shows that the excellent work you performed during the first year with the Office for Programme Planning and Coordination has been continued to the full satisfaction of your immediate supervisors. I am glad to note that you have fully met our expectation of continued professionalism, dedication to your task and hard work, which was the basis for your promotion. I consider you a staff member whose contribution over the past two years to the work of this Office, and undoubtedly also to the Offices in which you have served before, meets the high demands of competence and commitment which are to be expected from a United Nations official.
>
> From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time."

On 23 November 1983 the Deputy Chief of Staff Services informed the Applicant, "upon instruction by the Office of the Secretary-General", that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November 1983 the Applicant protested against that decision in a letter to the Assistant Secretary-General for Personnel Services which read:

> ". . . I am shocked at this decision since, in response to my queries, I was recently informed by the head of the Office in which I am working that he intended to recommend an extension of my appointment. I would be grateful if you could give me the reasons for this decision. In any case, the procedure followed in arriving at the decision not to renew my appointment is irregular and arbitrary and contravenes the legal expectancy of renewal which I have as well as my acquired rights under the General Assembly resolution 37/126, IV, paragraph 5, which states that the General Assembly:
>
> > 'decides that staff members on fixed-term appointment upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'.
>
> I would be grateful for your urgent attention to this matter. The abrupt manner in which the decision was taken and communicated to me has not allowed me the opportunity to use the internal recourse procedures that our Organization has established for challenging decisions of this kind.
>
> In order to permit me to resort meaningfully to these internal procedures I would be grateful if you could extend my contract for a period of three months while the matter is under investigation. This request is without prejudice to my claim to a longer-term appointment in the Organization. I am by a copy of this letter requesting the Grievance Panel to look into this case."

On 2 December 1983 the Assistant Secretary-General for Programme Planning and Co-ordination also protested against the decision in question in a letter addressed to the Assistant Secretary-General for Personnel Services; the letter read in part:

> "I find it extraordinary that such a decision should be taken without consulting the head of the Office concerned, especially in the case of an officer with eleven years of excellent service to the Organization, who has received a personal evaluation report with the highest rating only four weeks ago, was promoted to the P-5 level and was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year and is currently in the midst of important assignments for one of which he is in some ways uniquely well qualified and which are regarded as of considerable importance by member States. Bearing all these factors in mind I had assured Mr. Yakimetz, shortly after signing his latest performance evaluation report, that I intended to recommend a further extension of his contract.
>
> Apart from such matters of principle I wish to place on record the fact that this decision if allowed to stand would create severe problems for my Office over the next few months. Since, as you know, Mr. Yakimetz is barred from entering the Secretariat building the three other professional officers in the Programme Planning Section have had to assume Mr. Yakimetz's responsibilities for several sections of the 1984-1985 programme budget during the Assembly period. Mr. Yakimetz was therefore assigned full and sole responsibility for two important reports that must be completed in the next three months for the April 1984 meeting of CPC and has been working on them for the past several months. To reassign these reports at this stage would mean significant delays in their issuance and a loss in their quality.

> It is in the best interest of the Office to continue to have the services of Mr. Yakimetz. Considering Mr. Yakimetz's long and outstanding record within the United Nations, I strongly recommend that his appointment be extended."

On 13 December 1983 the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date; he stated:

> "General Assembly resolution 37/126, IV, paragraph 5, states that 'staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'. Staff regulation 4.4 requires that . . . 'the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations'. Staff rule 104.14 *(a)* (ii) says that 'subject to the criteria of Article 101, paragraph 3, of the Charter, and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat . . .'. Article 101 (3) of the Charter and staff regulation 4.2 give as the 'Paramount consideration' . . . 'the necessity for securing the highest standards of efficiency, competence and integrity'.
>
> My Department has made it clear to me that in their view I have met those standards. My performance was rated 'excellent' in my most recent Performance Evaluation Report. I was recently promoted to P-5. I was given to understand on many occasions, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position. The most recent assurance was a memorandum to me dated 8 November 1983 from the Assistant Secretary-General for Programme Planning and Co-ordination, who wrote:
>
> > 'From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time.'
>
> I understand that such a recommendation has been made. I have at all times tried to govern my conduct in accordance with the letter and the spirit of the Staff Rules and the terms and conditions of my contract with the United Nations. My Performance Evaluation Report indicates that I enjoy harmonious relationships with my colleagues. I was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year, a position of some trust.
>
> Given this service record and these assurances, and after six years of continuous service, most staff members would have an expectancy that their candidacy for a career appointment would be 'given every reasonable consideration', as General Assembly resolution 37/126 IV requires. The contested administrative decision appears to preclude such reasonable consideration. The interests of good administration cannot be served by the interruption of the work with which I have been entrusted by my Department. I can think of no impediment to the forwarding of my name to the Appointment and Promotion Board except factors extraneous to my performance. The quoted General Assembly resolution places no restrictions as to eligibility, nor do staff regulations 4.2 and 4.4 nor staff rule 104.14 *(a)* (ii). Extraneous factors may not be used as a consideration in promotion, extension, transfer or in any of the areas where the paramount consideration must be the necessity of securing the highest standards of effi-

> ciency, competence or integrity. Extraneous factors may not be used to deny a candidate for a post fair and reasonable consideration, a position upheld in Tribunal Judgement No. 310 *(Estabial)*.
>
> To deny me the right to reasonable consideration for a career appointment for any reason unrelated to merit-efficiency, competence, integrity—would, I believe, be a violation of Article 100 of the Charter.
>
> Therefore, I respectfully request that the Administrative decision be withdrawn and my name forwarded to the appropriate Appointment and Promotion body for reasonable consideration . . ."

In a reply dated 21 December 1983, the Assistant Secretary-General for Personnel Services stated:

> ". . . In your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be "given every reasonable consideration", as General Assembly resolution 37/126 IV requires'.
>
> Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.
>
> Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in staff rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.
>
> In view of the foregoing, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the decision communicated to you by letter of 23 November 1983. That decision is maintained and, therefore, the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment.
>
> Should you wish to pursue your appeal, the Secretary-General is prepared to agree to the direct submission of your case to the Administrative Tribunal."

On 6 January 1984 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:

(a) the Applicant was not in any legally cognizable sense on secondment;

(b) after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;

(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations.

2. The Applicant had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment.

3. The Applicant was denied the reasonable consideration for further employment to which he had a right.

Whereas the Respondent's principal contentions are:

1. The Applicant has no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract:

(a) the fixed-term contract excludes any expectancy;
(b) no circumstances outside the scope of the contract gave rise to legally cognizable expectations:

  (i) the circumstances relating to secondment could not have created an expectancy. The separation from government service during period of United Nations appointment did not result in new terms of contract with United Nations;
  (ii) the commendations by supervisors did not commit the Secretary-General to extend the appointment. The pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled;
  (iii) General Assembly resolution 37/126, IV, paragraph 5, did not effect a change in procedure on appointment.

2. The Secretary-General's decision against re-appointment was within his sole authority under the Charter and the Staff Regulations:

(a) in reaching his decision, the Secretary-General took into account all the circumstances in the case;
(b) in taking his decision in the case, the Secretary-General acted in the interest of the Organization.

The Tribunal, having deliberated from 11 May to 8 June 1984, now pronounces the following judgement:

I. In this case the legal issues involved are interspersed with political considerations. The Tribunal can however deal only with the legal issues, which are:

(a) whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;

(b) whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads

> "*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment"

has been carried out;

(c) the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship.

The issues mentioned above are not independent of each other; sometimes they overlap and at other times conclusions reached on any of them influence those on others.

II. As regards the controversy about the legal expectancy for further service with the United Nations, the Tribunal notes that although there was no reference to secondment in the Applicant's letters of appointment of 21

November 1969 and 28 December 1977, his third and last letter of appointment dated 8 December 1982 included a "special condition" that he was "on secondment from the Government of the Union of Soviet Socialist Republics". He accepted this letter of appointment without objection, and in fact he had accepted without comment the Respondent's letter of 23 November 1977 which had preceded the letter of appointment of 28 December 1977 and which had stated that he was offered a five-year fixed-term appointment "on secondment from the USSR Government".

III. A Note Verbale from the Respondent to the Permanent Mission of the USSR dated 23 November 1977 stated that the Applicant's five-year fixed-term appointment was to be on secondment from the USSR Government, as did a similar Note sent by the Respondent to the Permanent Mission on 22 October 1982 seeking the consent of the Government of the USSR to the extension of the Applicant's appointment on secondment for a further year. The Permanent Mission of the USSR replied on 15 November 1982 communicating its agreement to the extension of the Applicant's appointment.

From the foregoing, it can be concluded that all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the Government of the USSR.

IV. In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances. This accords with the analysis of secondment in the Tribunal's Judgement No. 92 *(Higgins)* as requiring the agreement of the "three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned" (para. VI) and with the decision of the Tribunal in paragraph V of Judgement No. 192 *(Levcik)* that "any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved".

V. The Respondent's letter of 21 December 1983 also relied, as does his answer to the application, on Staff Rule 104.12 *(b)*, reiterated in the Applicant's letter of appointment, which provides that a fixed-term appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment".

VI. Applying the principles followed in Judgements Nos. 142 *(Bhattacharyya)* and 205 *(El-Naggar)*, it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment.

VII. This conclusion needs no modification in the light of two other related arguments put forward by the Applicant. First, it is asserted that the Applicant's connection with the USSR Government was at best tenuous and informal and that his relationship with "the Ministry of Foreign Affairs was nominal rather than real". In support, the Applicant points out that in his first and second applications for employment with the United Nations, he answered in the negative the question "Are you now, or have you ever been, a permanent civil servant in your government's employ?". However, in his application in 1969 he had stated that he was a senior teacher at the Moscow Physical Engineering Institute. Moreover, in his letter of 10 February 1983 to the Permanent Representative of the USSR to the United Nations, he stated that he was "hereby resigning from my position with the Ministry of Foreign Affairs of the

USSR and from all other official positions I had in the Soviet Government". He wrote to the Secretary-General in similar vein on the same day.

VIII. The Applicant's second argument is that even if secondment existed or was implied for his service in the United Nations, a change in his status took place from 10 February 1983 onwards when he resigned from the service of the USSR Government, and that in fact a new contractual relationship could be assumed to have been created between him and the Respondent. He argues that the Respondent, by not taking disciplinary action against him, by promoting him, by allowing him to serve out his contract until the date of its expiry (26 December 1983), and by letting him continue as Vice-Chairman of the Appointment and Promotion Committee, created a new, although tacit, agreement in which the Soviet Government was not in any way involved.

IX. The Tribunal notes that apart from the measures described above, the Respondent also put the Applicant on special leave, which he had not asked for, and ordered that the Applicant's entry to the United Nations Headquarters building be barred. He states that the Applicant's promotion was no more than a consequence of his earlier good service. On 11 March 1983 the Respondent wrote to the Applicant that these steps were taken in the best interests of the Organization and advised him that "as regards . . . the possible extension of your appointment, I would wish to point out that consideration of this matter at this time would be premature. You may also wish to refer to Staff Rule 104.12 *(b)* which is applicable to this issue". This rule stipulates that the fixed-term appointment "does not carry any expectancy of renewal of or conversion to any other type of appointment". The Respondent further argues in his answer to the application that a break between a staff member and his government does not "constitute in itself grounds for terminating the fixed-term contract of a fixed-term staff member seconded or not". In its consideration of the conflicting arguments, the Tribunal finds that the events leading to and following from the Applicant's resignation from the service of the USSR Government throw much light for the resolution of this controversy.

X. In September-October 1982, the Assistant Secretary-General for Programme Planning and Co-ordination discussed with the Permanent Mission of the USSR a two-year extension for the Applicant's service with the United Nations, but apparently accepted that Mission's argument that "for technical reasons it was easier to propose extensions one year at a time".

XI. About the same time evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant. It was suggested to him that he should leave for Moscow early in 1983 for this purpose, but his application for leave was refused by the United Nations.

XII. The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences for his actions. In so far as he was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment. If his fixed-term appointment were not based on secondment he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise. Another consequence of his actions raised the question of his suitability as an international civil servant. In Judgement No. 326 *(Fischman)*, the Tribunal referred to the widely held belief mentioned in a report of the Fifth Committee of the General Assembly that

> "International officials should be true representatives of the cultures and

> personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations",

and held that this "must continue to provide an essential guidance in this matter".

In the same judgement, the Tribunal also recalled a part of Information Circular ST/AFS/SER.A/238 of 19 January 1954 which stated, *inter alia*, that

> "The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of his duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . ."

The Applicant had been granted asylum in the United States of America and there arose the problem of his having to waive privileges and immunities with the permission of the Respondent. Such a waiver was necessary for changing his visa category under the United States laws. However there was apparently no immediate problem and it seems that no request was made to the Respondent for agreeing to the Applicant waiving his privileges and immunities. Besides, a private bill was later introduced on the Applicant's behalf in the United States House and Senate.

XIII. In view of the foregoing, the Tribunal concludes that during the period of his service with the United Nations the Applicant was under secondment which, as already stated, could not be modified except with the consent of all three parties and that no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship.

XIV. With these conclusions in mind the Tribunal considered the Applicant's plea that he was entitled to, but was denied, the right to receive "every reasonable consideration" in terms of paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982.

XV. The Tribunal notes that until the end of November 1983, there was no reference to this resolution either by the Applicant or the Respondent. Before this time, the only mention of a career appointment occurs casually in the Applicant's memorandum of 25 October 1983 in which he expresses the hope to the Assistant Secretary-General for Programme Planning and Co-ordination that he would find it possible "on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment" without however citing the General Assembly resolution. A series of letters, memorandums and other communications exists relating to the Applicant's continuation with the United Nations; all of them consider extension of his current contract and none of them refers to the General Assembly resolution. In his letter of 29 November 1983 to the Assistant Secretary-General for Personnel Services the Applicant drew for the first time the attention of the Respondent to General Assembly resolution 37/126, IV, paragraph 5. A fuller argumentation on the basis of this plea occurs in the Applicant's letter of 13 December 1983. The Tribunal notes in this connection that as early as 3 March 1983, the Director of the Programme Planning and Evaluation Branch concluded his memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination by stating: "Mr. Yakimetz has indicated to me his willingness to continue to work, unless his current status would prevent him from so doing. Your guidance will be very much appreciated." There is no reply to this memorandum in the files and the Tribunal is left with the impression that the Applicant's plea based on the General Assembly resolution came much later in the proceedings.

XVI. However, even if the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion, the Respondent was bound nonetheless by its terms and the Tribunal has to decide how and to what extent he carried out his obligations under it.

The Respondent's letter dated 21 December 1983, addressed to the Applicant in reply to his counsel's letter of 13 December 1983, states that he has "given careful consideration to the issues raised in your request for administrative review", and since these issues are particularly related to the provision of the General Assembly resolution in question, the plain and simple inference is that the Respondent had given the required (i.e., "every reasonable") consideration for a career appointment for the Applicant. This is further elaborated in the Respondent's answer to the application when he states:

> "Respondent notes that the General Assembly only stated a desideratum, namely, that fixed-term appointees be given reasonable consideration; the Assembly did not specify new procedures for effecting such consideration, or suggest that existing procedures not be utilized, and did not convert fixed-term appointments to probationary appointments, whose holders must, as a matter of right, be reviewed by the Appointment and Promotion Board before being separated after two years of probationary service. Respondent therefore submits that, in the absence of such specification, suggestion or conversion, the existing procedures under the Staff Regulations and Rules, which form an integral part of all staff members' terms of appointment, including Applicant's, remain applicable."

XVII. To this the Applicant replies that the Respondent cannot argue that the pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled, since he himself prevented their fulfillment.

XVIII. The General Assembly resolution is silent on who should give "every reasonable consideration" and by what procedure. That this latter question needed elucidation is evident from a subsequent resolution of the General Assembly adopted on 20 December 1983, i.e., six days before the Applicant's fixed-term appointment came to an end. The relevant part of this resolution (38/232, VI, para. 5) reads:

> "*Recommends* that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts."

The Tribunal holds that until the Respondent has accepted the recommendation made by the General Assembly on 20 December 1983, the existing procedure of offering a probationary appointment to a candidate remains applicable, and that in the absence of such an appointment it is left to the Respondent to decide how "every reasonable consideration" for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5. In the present case, the Respondent had the sole authority to decide what constituted "reasonable consideration" and whether the Applicant could be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27

December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given "every reasonable consideration" to the Applicant's career appointment.

XIX. In this context, the *Rosescu* case (ILO Administrative Tribunal Judgment No. 431 of 11 December 1980) has been cited by both the Applicant and the Respondent, but their interpretations of its considerations are widely divergent. In the present case, different in many material respects from the *Rosescu* case, there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter. Indeed, he states all throughout that the measures he took were in the interests of the United Nations taking into account all the facts, "together with the representations to diverse effect by the permanent missions of two member States".

In Judgement No. 54 *(Mauch)*, the Tribunal stated that:

> "While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

In the present case, the Tribunal holds that the Respondent's action in the exercise of his discretion cannot be impugned on any of the grounds stated above.

XX. In view of the above, the Tribunal holds that the Applicant's pleas cannot be sustained. The Tribunal would however express its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment "every reasonable consideration" as enjoined by the General Assembly resolution. However, this omission on the part of the Respondent has not caused any discernible injury to the Applicant and he is therefore not entitled to any monetary relief.

XXI. Accordingly, and subject to the comments made in the preceding paragraph, the Tribunal rejects the application.

(Signatures)

Endre USTOR,
President.

Samar SEN,
Vice-President.

Jean HARDY,
Executive Secretary.

Geneva, 8 June 1984.

STATEMENT BY MR. ENDRE USTOR

I concur in the Judgement as in my view the rejection of the Application is fully justified. I cannot, however, accept some parts of the reasoning.

I agree with the finding that the Applicant's appointment had satisfied the requirements of secondment as set out by this Tribunal in earlier Judgements (Nos. 92: *Higgins* and 192: *Levcik*). I believe, however, that the doctrine developed in this respect by the Tribunal—based on the very nature of the concept of secondment—precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other type of appointment without the consent of the government concerned.

In view of the above, the Applicant was in my view not eligible for consideration for a career appointment. In any event, the Applicant, in view of the circumstances in which he elected to break his ties with his country, "could no longer claim to fulfil the conditions governing employment in the United Nations" and could not expect that any consideration would lead to his career employment. As the Respondent exercised his discretionary power correctly by refusing the requests of the Applicant, he does not deserve the disapproval expressed in the Judgement.

(Signed) Endre USTOR,

Geneva, 8 June 1984.

DISSENTING OPINION OF MR. ARNOLD KEAN

1. Although I can concur in the view of my colleagues that the Applicant was employed by the United Nations on secondment from the Government of the USSR for the whole of his final fixed-term appointment, and with the rejection of the Applicant's claim in so far as it is based on an expectancy of further employment, I regret that I cannot concur in the conclusion reached by the majority Judgement.

2. The majority Judgement does not, in my view, adequately consider whether the Respondent gave due effect to General Assembly resolution 37/126, paragraph IV.5, the relevant part of which reads as follows:

> [The General Assembly] "*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

It will be observed that consideration for a career appointment was not expressed in the resolution to be conditional on the staff member having a legal expectancy of a further appointment. The resolution, although not yet incorporated in the Staff Rules, was nevertheless a condition of the Applicant's employment, binding on the Respondent, who must have been fully aware of it (Judgement No. 249: *Smith*).

3. The Respondent does not dispute that the Applicant had, by 1983, completed more than five years of satisfactory service on fixed-term appointments, so that he fell within the terms of the resolution. The Respondent does, however, contend in paragraph 17 of his answer that the relevant paragraph of the resolution (para. IV.5) only stated a "desideratum". This contention is without

foundation, because the General Assembly expressly used the word "decides" in paragraph IV.5, while in cases where it was only expressing a desideratum (paras. IV.7 and V) it used the word "requests", or, in paragraph IV.3 and 4, the word "recommends". The contrast in the choice of verb is striking and was no doubt deliberate: Paragraph IV.5 must be regarded as a decision of the General Assembly which the Respondent was obliged to obey.

4. The decision taken by the Respondent in pursuance of General Assembly resolution 37/126, paragraph IV.5, was, however, discretionary. The ILO Administrative Tribunal, in its Judgment No. 431 *(Rosescu)*, has considered the extent to which such a discretionary decision is subject to review:

> "Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the facts." (Para. 5.)

This principle is similar to that adopted by the United Nations Administrative Tribunal in Judgement No. 54 *(Mauch)*. The Respondent has submitted in his answer to the application (para. 21) that "the decision not to re-appoint the Applicant was properly based . . . on the interests of the Organization". This would not, however, shelter the Respondent from review of the question whether the decision was tainted by some such flaw as is referred to in the Judgements cited above.

5. The Applicant received from the Administration two letters in which his claim was rejected. The first, dated 11 March 1983, was from the Director of the Division of Personnel Administration. It stated that consideration of the possible extension of the Applicant's appointment would be premature at that time. It also referred the Applicant to Staff Rule 104.12 *(b)* which provides that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.

6. The other letter giving reasons for the rejection of the Applicant's claim was from the Assistant Secretary-General for Personnel Services and was dated 21 December 1983. It stated the Respondent's view as follows:

> ". . . your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, *cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.*" (Emphasis added.)

7. This argument was, by its terms, addressed to "expectancy of renewal", as was the tenor of the whole letter, particularly in its reference to Staff Rule 104.12 *(b)*. It was evidently the belief of the writer of the letter that, if the Applicant had no expectancy of renewal, there was no possibility of his receiving a career appointment in pursuance of the General Assembly resolution. That resolution is, however, not conditional upon the staff member having an expectancy of further employment, which is therefore in no way a prerequisite of a career appointment.

8. A second factor which, according to the Administration's letter, was regarded by the Respondent as decisively obviating further consideration of the Applicant for a career appointment under the General Assembly resolution, was

that his existing fixed-term appointment was on the basis of secondment under a one-year contract, by which "the Organization agreed so to limit the duration of your United Nations service". This supposedly agreed limit was expressed in the letter to apply to service generally, and not only to service on secondment.

9. The supposed agreement by the Organization might have been either expressed or implied. No evidence has been produced of any expressed agreement and it must be considered whether any such agreement is implied in the nature of secondment. The Applicant's secondment ended on 26 December 1983, and the question therefore arises whether, on that date and bearing in mind that he had previously resigned any posts he had held with his Government, he was then obliged to return to its service. In its Judgement No. 92 *(Higgins)*, paragraph IV, where the Tribunal considered the nature of secondment, there is reference only to rights of the seconded staff member, and no reference to or implication of a duty on his part to return to the service of the releasing organization. Clearly, as indicated by the Tribunal in Judgement No. 192 *(Levcik)*, the staff member's secondment cannot be confirmed or extended without the consent of the releasing government, but, in the words of the ILO Administrative Tribunal in Judgment No. 431 *(Rosescu)*, paragraph 7: "if the Romanian authorities had . . . wanted to have the complainant back again, . . . they would have needed his consent".

10. In the Applicant's case, there was in the circumstances no possibility, and no desire on the part of the Government or of the Applicant, that he should rejoin the service of that Government, from which he had recently resigned. The only effect, therefore, of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provision of Article 101.3 of the Charter of the United Nations that "the *paramount consideration* in the employment of the staff . . . shall be the necessity of securing the highest standards of efficiency, competence, and integrity" (emphasis added).

11. Guidance may be derived from the *travaux préparatoires* used by the General Assembly in preparing the resolution in question, which indicate that, when it came to considering a seconded staff member for a career appointment, it was generally agreed that the views of the Government concerned should be "fully taken into account". The relevant passage (para. 33) of Annex I to the Report of the International Civil Service Commission (ICSC), 1982 (*General Assembly Official Records*, 37th Session, Supplement No. 30 (A/37/30)) reads as follows:

> "The Commission *recommends* that, upon completion of five years of service, each employee be given every reasonable consideration by the employing organization for a career appointment. With regard to staff on secondment, the majority of the members of the Commission stressed the need for each organization, in situations when it wished to retain the services of the staff member beyond the period of the initial agreement, to take fully into account the views of the releasing government. The other members, while not objecting to this, felt that this should not in any way prejudice the individual rights of the staff member."

Far from there being a generally accepted rule that in the absence of the government's consent a seconded staff member must always be refused, *in limine*, a career appointment at the end of his period of secondment, this paragraph makes it quite clear that the government's view was not to be decisive but was to be fully taken into account together with all other relevant factors. The report of the ICSC does not indicate how much weight, if any, should be given to the views of the releasing government if the effect of refusing its consent could not have been to recover the staff member for its own service (which in the circumstances of the Applicant's case was clearly impossible) but only to prevent his future employment by the United Nations.

12. For the foregoing reasons, my opinion is that the Respondent's decision was flawed by fundamental mistakes of fact or law and requires to be set aside, and that the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment[1].

(Signed) Arnold KEAN,

Geneva, 8 June 1984.

A/AC.86/2/Rev.3
25 March 1983.

10. Rules of Procedure[2]

Article I

1. The proceedings of the Committee shall be governed by the rules of procedure of the General Assembly applicable to committees.

2. In addition to the aforementioned rules of procedure of the General Assembly, the following special rules, set out in Articles II to XII below, relating to applications under Article 11 of the Statute of the United Nations Administrative Tribunal shall apply.

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[1] Reference has been made in the majority Judgement to Judgement No. 326 *(Fischman)*, a decision made previously during the present session of the Tribunal. This referred to a report of the Fifth Committee, dated 1953 (doc. A/2615, para. 70), recording a "widely shared view" that "international officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations". Consideration of this view requires caution because the next two paragraphs of the report (paras. 71 and 72) record that two proposals inconsistent with that view were put forward, one by the representative of Czechoslovakia (which was rejected) and the other by the representative of Lebanon (which was accepted by a majority vote). Both proposals were concerned with the quotas to which officials who had broken their ties with their country should be assigned for the purposes of geographical distribution, a question which would have been meaningless if it had been accepted that such officials "no longer fulfilled the conditions governing employment in the United Nations".

[2] The Committee adopted provisional rules of procedure at its first meeting on 16 October 1956 which were amended at its meetings on 25 October 1956 (A/AC.86/2), 21 January 1957 (A/AC.86/2/Rev.1) and 11 December 1974 (A/AC.86/2/Rev.2 and A/AC.86/19). At its twenty-second session the Committee carried out a comprehensive review of its procedures and at its meeting on 16 February 1983 adopted the rules set out in this document as its definitive rules of procedure (A/AC.86/28).

Article II

1. Applications asking the Committee to request advisory opinion of the International Court of Justice shall be submitted in writing to the official designated by the Secretary-General to serve as Secretary of the Committee. For the purposes of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, the date of the judgement shall be considered to be the date on which it has been received by the parties to the proceedings before the Tribunal, which date shall be presumed to be two weeks after the dispatch of copies thereof by the Executive Secretary of the Tribunal. For the purposes of paragraph 2 of Article 11 of the Statute, the date of the receipt of an application is the date when copies of that application are dispatched to the members of the Committee by the Secretary of the Committee[1].

2. The application, except for any annexed documents, shall be submitted in any of the six languages of the General Assembly and shall be as brief as possible, in no event exceeding 12 pages. It shall contain the following information, which should be set out in the order indicated below:

(a) The number and date of the judgement concerning which a review is desired, and the names of the parties with respect to which the judgement was rendered.

(b) The full name of the applicant for review, and his address or that of his representative for the purpose of the proceedings. If the applicant for review is one who has succeeded to the rights of the person in respect of whom the judgement was rendered on the latter's death, this fact, together with supporting evidence including relevant data pertaining to the succession, shall be set forth.

(c) A statement setting forth in detail the grounds of the application under paragraph 1 of Article 11 of the Statute of the Administrative Tribunal and the supporting arguments.

(d) A list of any supporting documents which are annexed to the application.

Article III

1. Upon receipt of an application the Secretary shall as soon as possible have it (excluding any annexed documents) translated into the other languages of the General Assembly and thereafter immediately communicate it to all members of the Committee, as well as to the applicant for review and to the other party or parties to the proceedings before the Administrative Tribunal, together with a copy of the judgement to which it relates and an indication of where any annexed documents may be examined. Any document annexed to the application that is not available in English or French shall be translated into one of those languages at the request of any member of the Committee, except that no translation shall be made without the approval of the Committee if the document to be translated exceeds five pages.

2. Notwithstanding paragraph 1, if an application manifestly does not comply with the requirements of Article II, paragraph 2, above, the Secretary, with the approval of the Chairman or in his absence the Rapporteur, shall, if the non-

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[1] The Committee agreed that the period of two weeks referred to in the second sentence of this paragraph should have the status of a presumption only, so that it would be open to either party to the proceedings to show that the actual date of receipt of a judgement delivered by the Administrative Tribunal was later than two weeks after its dispatch by the Executive Secretary (A/AC.86/28, para. 4).

compliance appears susceptible of correction, return the application to the applicant with a request that it be corrected and resubmitted within one week of the date of return if the applicant is located in New York or otherwise within three weeks. If the application is not resubmitted in correct form within the indicated time-limit or if it does not appear to be susceptible of correction, it shall be considered to be irreceivable and the Secretary shall so inform the applicant[1].

Article IV

1. The other party to the proceedings before the Administrative Tribunal or each of the parties in those cases where the application is made by a member State may, within one week from the date on which a copy of the application was communicated in accordance with paragraph 1 of Article III above if the party is located in New York or otherwise within three weeks, submit in writing to the Secretary its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted in any of the six languages of the General Assembly and shall in no event exceed 12 pages (excluding any annexed documents).

Article V

Copies of comments submitted in accordance with Article IV above shall be forthwith circulated by the Secretary to the members of the Committee, to the applicant for review and to the parties to the Administrative Tribunal proceedings.

Article VI

The Committee shall be convened as soon as possible after the expiry of the time-limit for receipt of comments in accordance with Article IV above, and in any event no later than 25 days from the date of the receipt of the application.

Article VII

1. Except as provided in paragraph 4, all meetings of the Committee shall be closed.

2. Observations that the parties to the proceedings before the Administrative Tribunal wish to present to the Committee shall be submitted exclusively in writing. However, if the application is submitted by a member of the Committee, both parties to the proceedings before the Administrative Tribunal may request to be heard by the Committee for the purpose of allowing the parties or their representatives, with the permission of the Chairman, to make statements to the Committee concerning the application and to reply to questions that may be posed by members of the Committee.

3. All deliberations of the Committee shall take place in private, with the assistance solely of its Secretary and members of the Secretariat servicing the meeting. The Committee shall take all its decisions concerning an application in private session.

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[1] The Committee requested its Secretary to inform it at the beginning of each session of any applications submitted since its last session that had been treated as irreceivable pursuant to this paragraph (A/AC.86/28, para. 5).

4. The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record.

Article VIII

The Committee may at any time invite additional information or views on any point with respect to which it considers such information or views necessary, provided that in such cases the same opportunity to present additional information or views is afforded to all parties to the Administrative Tribunal proceedings.

Article IX

1. The Committee shall take a decision in respect of each ground of the application set forth in accordance with subparagraph 2 *(c)* of Article II above.

2. If the Committee decides that there is a substantial basis for the application under Article 11 of the Statute of the Administrative Tribunal, it shall request an advisory opinion from the International Court of Justice, which request shall specify the ground or grounds as to which it has so decided pursuant to paragraph 1.

Article X

The decision taken by the Committee with respect to an application, together with the text of its request, if any, for an advisory opinion, shall be communicated by the Secretary to the parties to the proceedings before the Administrative Tribunal and to the Tribunal, and shall be circulated as a Committee document to all member States.

Article XI

1. Sound recordings shall be prepared and kept of all proceedings of the Committee, in accordance with the practice of the United Nations.

2. If the Committee requests an advisory opinion of the International Court of Justice in respect of an application, the Secretary shall prepare and transmit to the Court, to all members of the Committee and to the parties to the proceedings before the Administrative Tribunal, a verbatim record, in English and French, of the proceedings of the Committee in respect of that application, except for those in the private deliberations provided for in paragraph 3 of Article VII.

Article XII

1. The Committee shall, at its first session after the opening of each regular session of the General Assembly, elect the following officers:

(a) A Chairman, provided that until such election the Chairman of the Sixth Committee at the current or most recent session of the General Assembly shall serve as Chairman;

(b) A Rapporteur, provided that until such election the Rapporteur previously elected by the Committee shall continue to serve in that capacity.

2. The Rapporteur shall perform the functions of the Chairman in the absence of the latter.

A/AC.86/28
25 March 1983.

11. Procedures of the Committee

Second report of the Committee

Chairman: Mr. Philippe KIRSCH (Canada)
Rapporteur: Mr. F. D. BERMAN (United Kingdom of Great Britain and Northern Ireland)

1. At the 1st meeting of its twenty-second session, on 14 December 1982, the Committee's attention was drawn to the Advisory Opinion delivered by the International Court of Justice on 20 July 1982 in connection with the Application for Review of Administrative Tribunal Judgement No. 273 *(Mortished* v. *the Secretary-General of the United Nations)*[1]. In that opinion, the Court expressed concern about certain procedures followed by the Committee in considering that application. On the proposal of the Chairman, the Committee decided to add to its agenda an item entitled "Procedures of the Committee". Subsequently, the Committee decided to defer consideration of that item to a later meeting and requested the Secretariat to prepare appropriate documentation for the Committee.

2. The Committee considered that item at meetings held on 4, 15 and 16 February 1983 (2nd to 6th meetings of the twenty-second session). Mr. Paul C. Szasz, of the Office of Legal Affairs, assisted the Committee in this exercise.

3. The Committee had before it a document prepared by the Secretariat containing possible amendments to the Rules of Procedure (A/AC.86/107), which was circulated to members of the Committee in advance of its meeting on 4 February, and two informal working papers, also prepared by the Secretariat, circulated to members of the Committee at its meetings on 15 and 16 February (informal Working Papers Nos. 1 and 2).

4. In connection with paragraph 1 of Article II of the Rules of Procedure, the Committee agreed that the period of two weeks referred to in the revised form of the second sentence should have the status of a presumption only: it would be open to either party to the proceedings to show that the actual date of receipt of a judgement delivered by the Administrative Tribunal was later than two weeks after its dispatch by the Executive Secretary. As the normal proof would be a dated acknowledgement of receipt signed by or for the party, the Committee agreed that the Executive Secretary of the Administrative Tribunal should be encouraged to make arrangements to obtain such an acknowledgement from each addressee.

5. In connection with the new paragraph 2 of Article III of the Rules of Procedure, the Committee requested the Secretary to inform it at the beginning of

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[1] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Mortished* v. *the Secretary-General of the United Nations), I.C.J. Reports 1982.*

each session of any application submitted since its last session that had been treated as irreceivable pursuant to that article.

6. At its sixth meeting, on 16 February, the Committee adopted, without a vote, a number of amendments to its provisional rules of procedure and, subsequently, the Committee adopted, again without a vote, its amended provisional rules as a whole as its definitive rules of procedure. These are reproduced in the Annex to the present report.

7. In the course of reviewing its procedures the Committee took note of the observations of the International Court of Justice in its advisory opinion of 20 July 1982[1] concerning the position of a State member of the Committee in connection with votes taken on an application for review submitted to the Committee by that State. The Committee did not consider it necessary to make any amendment to its rules of procedure in that respect, but was confident that, in any such future case, members of the Committee would bear the observations of the Court in mind in exercising their rights.

8. At the conclusion of the Committee's consideration of its procedures, a member of the Committee expressed the view that the task of the International Court of Justice might be facilitated if arrangements could be made for oral hearings in connection with the Court's consideration of requests for advisory opinions emanating from the Committee.

Annex

RULES OF PROCEDURE OF THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

(as adopted by the Committee at the 6th meeting of its
twenty-second session, on 16 February 1983)[2]

Article I[3]

1. The proceedings of the Committee shall be governed by the Rules of Procedure of the General Assembly applicable to committees.

2. In addition to the aforementioned Rules of Procedure of the General Assembly, the following special rules, set out in Articles II to *XI* below, relating to applications under Article 11 of the Statute of the United Nations Administrative Tribunal shall apply.

Article II

1. Applications asking the Committee to request an advisory opinion of the International Court of Justice shall be submitted in writing to the official designated by the Secretary-General to serve as Secretary of the Committee. *For*

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[1] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Mortished* v. *the Secretary-General of the United Nations), I.C.J. Reports 1982*, at para. 44.

[2] New provisions and other substantive changes in the rules adopted by the Committee at its twenty-second session are italicized. The numbering of the rules as reflected in document A/AC.86/2/Rev.2* has been maintained at this stage to avoid confusion and to facilitate identification of changes, additions and deletions. The revised rules with new numbering are reproduced in a separate Committee document (A/AC.86/2/Rev.3).

[3] The provisions contained in this article were not amended by the Committee.

the purpose of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, the date of the judgement shall be considered to be the date on which it has been been received by the parties to the proceedings before the Tribunal, which date shall be presumed to be two weeks after the dispatch of copies thereof by the Executive Secretary of the Tribunal. For the purposes of paragraph 2 of Article 11 of the Statute, the date of the receipt of an application is the date when copies of that application are dispatched to the members of the Committee by the Secretary of the Committee.

2. [Deleted]

3. *The application, except for any annexed documents, shall be submitted in any of the six languages of the General Assembly and shall be as brief as possible, in no event exceeding 12 pages. It shall contain the following information, which should be set out in the order indicated below:*

(a) The number and date of the judgement concerning which a review is desired, and the names of the parties with respect to which the judgement was rendered.

(b) The full name of the applicant for review, and his address *or that of his representative* for the purpose of the proceedings. If the applicant for review is one who has succeeded to the rights of the person in respect of whom the judgement was rendered on the latter's death, this fact, together with supporting evidence including relevant data pertaining to the succession, shall be set forth.

(c) A statement setting forth in detail the grounds of the application under paragraph 1 of Article 11 of the Statute of the Administrative Tribunal and the supporting arguments.

(d) [Deleted]

(e) A list of any *supporting* documents which are *annexed to* the application.

Article III

1. *Upon receipt of an application the Secretary shall as soon as possible have it (excluding any annexed documents) translated into the other languages of the General Assembly and thereafter immediately communicate it to all members of the Committee, as well as to the applicant for review and to the other party or parties to the proceedings before the Administrative Tribunal, together with a copy of the Judgement to which it relates and an indication of where any annexed documents may be examined. Any document annexed to the application that is not available in English or French shall be translated into one of those languages at the request of any member of the Committee, except that no translation shall be made without the approval of the Committee if the document to be translated exceeds five pages.*

2. *Notwithstanding paragraph 1, if an application manifestly does not comply with the requirements of Article II, paragraph 3, above, the Secretary, with the approval of the Chairman or in his absence the Rapporteur, shall, if the noncompliance appears susceptible of correction, return the application to the applicant with a request that it be corrected and resubmitted within one week of the date of return if the applicant is located in New York or otherwise within three weeks. If the application is not resubmitted in correct form within the indicated time-limit or if it does not appear to be susceptible of correction, it shall be considered to be irreceivable and the Secretary shall so inform the applicant.*

Article IV

1. The other party to the proceedings before the Administrative Tribunal or each of the parties in those cases where the application is made by a member State may, *within one week from the date on which a copy of the application was communicated in accordance with paragraph 1 of Article III above if the party is located in New York or otherwise within three weeks,* submit in writing to the Secretary its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted *in any of the six languages of the General Assembly and shall in no event exceed 12 pages (excluding any annexed documents).*

Article V[1]

Copies of comments submitted in accordance with Article IV above shall be forthwith circulated by the Secretary to the members of the Committee, to the applicant for review and to the parties to the Administrative Tribunal proceedings.

Article VI

The Committee shall be convened as soon as possible after the expiry of the time-limit for receipt of comments in accordance with Article IV above, and in any event no later than *25* days from the date of the receipt of the application.

Article VIbis

1. *Except as provided in paragraph 4, all meetings of the Committee shall be closed.*

2. *Observations that the parties to the proceedings before the Administrative Tribunal wish to present to the Committee shall be submitted exclusively in writing. However, if the application is submitted by a member of the Committee, both parties to the proceedings before the Administrative Tribunal may request to be heard by the Committee, in which case the Chairman shall convene a meeting of the Committee for the purpose of allowing the parties or their representatives, with the permission of the Chairman, to make statements to the Committee concerning the application and to reply to questions that may be posed by members of the Committee.*

3. *All deliberations of the Committee shall take place in private, with the assistance solely of its Secretary and members of the Secretariat servicing the meeting. The Committee shall take all its decisions concerning an application in private session.*

4. *The decisions of the Committee and the text of any questions to be addressed to the International Court of Justice, as well as the results of and the participants in any votes taken during the private deliberations, shall be formally announced in a public meeting, at which any member of the Committee may make a statement for the record.*

Article VII[1]

The Committee may at any time invite additional information or views on any point with respect to which it considers such information or views necessary, provided that in such cases the same opportunity to present additional information or views is afforded to all parties to the Administrative Tribunal proceedings.

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[1] The provisions contained in this article were not amended by the Committee.

Article VIII

1. *The Committee shall take a decision in respect of each ground of the application set forth in accordance with subparagraph 3* (c) *of Article II above.*

2. If the Committee decides that there is a substantial basis for the application under Article 11 of the Statute of the Administrative Tribunal, it shall request an advisory opinion from the International Court of Justice, *which request shall specify the ground or grounds as to which it has so decided pursuant to paragraph 1.*

Article IX

The decision taken by the Committee with respect to an application, together with the text of its request, if any, for an advisory opinion, shall be communicated by the Secretary to the parties to the proceedings before the Administrative Tribunal and to the Tribunal, *and shall be circulated as a Committee document to all member States.*

Article X

1. *Sound recordings shall be prepared and kept of all proceedings of the Committee, in accordance with the practice of the United Nations.*

2. *If the Committee requests an advisory opinion of the International Court of Justice in respect of an application, the Secretary shall prepare and transmit to the Court, to all members of the Committee and to the parties to the proceedings before the Administrative Tribunal, a verbatim record, in English and French, of the proceedings of the Committee in respect of that application, except for those in the private deliberations provided for in paragraph 3 of Article VIbis.*

Article XI

1. *The Committee shall, at its first session after the opening of each regular session of the General Assembly, elect the following officers:*

(a) *a Chairman, provided that until such election the Chairman of the Sixth Committee at the current or most recent session of the General Assembly shall serve as Chairman;*

(b) *a Rapporteur, provided that until such election the Rapporteur previously elected by the Committee shall continue to serve in that capacity.*

2. *The Rapporteur shall perform the functions of the Chairman in the absence of the latter.*

12.	General Assembly resolution 37/126, Report of the International Civil Service Commission (17 December 1982)[1]	*General Assembly, Official Records*, Thirty-seventh Session, Supplement No. 51
13.	General Assembly resolution 38/232, United Nations common system: report of the International Civil service Commission (20 December 1983)[1]	*General Assembly, Official Records*, Thirty-eighth Session, Supplement No. 47
14.	General Assembly, Eighth Session, Report of the Fifth Committee, agenda item 51, "Personnel policy: reports of the Secretary-General and of the Advisory Committee on Administrative and Budgetary Questions" (7 December 1953)[1]	*General Assembly, Official Records*, eighth Session, Annexes, agenda item 51, A/2615
15.	Information Circular, Visa status of non-United States staff members serving in the United States, 19 January 1954[1]	ST/AFS/SER.A/238
16.	United Nations Administrative Tribunal: Statute and Rules, Provisions in force with effect from 3 October 1972[1]	AT/11/Rev.4
17.	Staff Regulations (1983)[1]	ST/SGB/Staff Regulations/Rev.15
18.	Staff Rules: Staff Regulations of the United Nations and Staff Rules 101.1 to 112.8 (1984)[2]	ST/SGB/Staff Rules/1/Rev.6

C. Documents[1,3] Submitted to the United Nations Administrative Tribunal: Case No. 322: Yakimetz against the Secretary-General of the United Nations

19. Applicant's Statement of Facts and Arguments (3 January 1984)
20. Annexes to Applicant's Statement of Facts and Arguments (Annexes 1 to 42)
21. Respondent's Answer (14 March 1984)
22. Observations [by Applicant] on the Answer of the Respondent (including Annexes 43 to 45) (13 April 1984)

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[1] Documents not reproduced. *[Note by the Registry.]*

[2] This version of the Staff Rules is the version in force as of 1 January 1984 but the provisions relevant to the application are unchanged from those in force at the time of Mr. Yakimetz's separation (26 December 1983).

[3] In these documents, which were submitted to the United Nations Administrative Tribunal, Mr. Yakimetz is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". These documents are noted in the opening paragraphs of Judgement No. 333 of the Tribunal (doc. No. 9) and constitute the written submissions made to the Administrative Tribunal in the case.

D. Administrative Tribunals Judgements Cited in the Documents Submitted to the Committee and to the United Nations Administrative Tribunal or in Its Judgement No. 333 (listed in alphabetical order)

1. Judgements[1] *of the United Nations Administrative Tribunal*

23. *Bhattacharyya against the Secretary-General of the United Nations*, Judgement No. 142.
24. *El-Naggar against the Secretary-General of the United Nations*, Judgement No. 205.
25. *Estabial against the Secretary-General of the United Nations*, Judgement No. 310.
26. *Fischman against the Secretary-General of the United Nations*, Judgement No. 326.
27. *Higgins against the Secretary-General of the Inter-Governmental Maritime Consultative Organization*, Judgement No. 92.
28. *Levcik against the Secretary-General of the United Nations*, Judgement No. 192.
29. *Mauch against the Secretary-General of the United Nations*, Judgement No. 54.
30. *Nath against the Secretary-General of the United Nations*, Judgement No. 181.
31. *Seraphides against the Secretary-General of the United Nations*, Judgement No. 140.
32. *Sikand against the Secretary-General of the United Nations*, Judgement No. 95.
33. *Smith against the Secretary-General of the United Nations*, Judgement No. 249.

2. A Judgment of the International Labour Organisation Administrative Tribunal

34. *In re Rosescu [against the International Atomic Energy Agency]*, Judgment No. 431[1].

Part II of the Dossier. Documents directly relating to the Formulation of Paragraph 5 of Section IV of General Assembly resolution 37/126 of 17 December 1982 and of Paragraph 5 of Section VI of General Assembly resolution 38/232 of 20 December 1983

A. Paragraph 5 of Section IV of General Assembly resolution 37/126

1. Documents[1] *of the Thirty-fifth Session of the General Assembly*

35.	General Assembly resolution 35/210, Personnel questions (17 December 1980)	*General Assembly, Official Records*, thirty-fifth Session, Supplement No. 48

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[1] Documents not reproduced. *[Note by the Registry.]*

2. Documents[1] of the Thirty-sixth Session of the General Assembly

36.	Joint Inspection Unit: Personnel Questions: Personnel policy options (14 September 1981)	A/36/432 (JIU/REP/81/11)
37.	Joint Inspection Unit: Personnel Questions: Personnel policy options: Note by the Secretary-General (29 October 1981)	A/36/432/Add.1 (JIU/REP/81/11, Annex VIII)
38.	Joint Inspection Unit: Personnel Questions: Personnel policy options: Comments of the Secretary-General (27 November 1981)	A/36/432/Add.2
39.	Report of the International Civil Service Commission (1981) (see para. 17 and Annex I)	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 30, A/36/30
40.	Personnel questions: Report submitted by the Staff Unions and Associations of the United Nations Secretariat: Note by the Secretary-General (see paras. 96 to 98 and 101 to 106) (15 October 1981)	A/C.5/36/19
41.	Report of the Fifth Committee, agenda item 107, Personnel questions (15 December 1981) (see paras. 1 to 3, 55, 62 and 64)	*General Assembly, Official Records*, Thirty-sixth Session, Annexes, agenda item 107, A/36/831
42.	Report of the Fifth Committee, agenda item 108, Report of the International Civil Service Commission (17 December 1981)	*General Assembly, Official Records*, Thirty-sixth Session, Annexes, agenda item 108, A/36/840
43.	General Assembly resolution 36/233, Report of the International Civil Service Commission (18 December 1981), section III, paragraph 1	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 51
44.	General Assembly decision 36/457, Concept of career, types of appointment, career development and related questions (18 December 1981)	*General Assembly, Official Records*, Thirty-sixth Session, Supplement No. 51

3. Documents[1] of the Thirty-seventh Session of the General Assembly

45.	Report of the International Civil Service Commission (1982) (see paras. 10 and 283-311, Annex I, paras. 24 to 34 and Appendix II, paras. 41 to 67)	*General Assembly, Official Records*, Thirty-seventh Session, Supplement No. 30, A/37/30
46.	Report of the International Civil Service Commission: Comments by the Federation of International Civil Ser-	A/C.5/37/29

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[1] Documents not reproduced. *[Note by the Registry.]*

	vants' Associations (FICSA): Note by the Secretary-General (1 November 1982) (see paras. 7 to 9)	
47.	Joint Inspection Unit: Personnel Questions, Second report of the career concept, Note by the Secretary-General (12 October 1982)	A/37/528 (JIU/REP/82/3)
48.	Joint Inspection Unit: Personnel Questions: Personnel policy options and second report on the career concept: Comments of the Administrative Committee on Co-ordination (28 October 1982)	A/37/528/Add.1

Summary records of meetings and a document[1] *of the Fifth Committee*

49.	23rd meeting, 1 November 1982 (see paras. 10 and 11)	*General Assembly, Official Records*, Thirty-seventh Session, A/C.5/37/SR.23
50.	26th meeting, 4 November 1982 (see paras. 25 and 30)	*Ibid.*, A/C.5/37/SR.26
51.	27th meeting, 5 November 1982 (see paras. 15 and 16)	*Ibid.*, A/C.5/37/SR.27
52.	28th meeting, 8 November 1982 (see paras. 37, 38, 43, 44 and 45)	*Ibid.*, A/C.5/37/SR.28
53.	29th meeting, 9 November 1982 (see para. 42)	*Ibid.*, A/C.5/37/SR.29
54.	30th meeting, 10 November 1982 (see para. 47)	*Ibid.*, A/C.5/37/SR.30
55.	31st meeting, 10 November 1982 (see paras. 2, 14, 24, 30, 42 and 52)	*Ibid.*, A/C.5/37/SR.31
56.	33rd meeting, 12 November 1982 (see paras. 13 and 14)	*Ibid.*, A/C.5/37/SR.33
57.	34th meeting, 15 November 1982 (see paras. 44, 50 and 61)	*Ibid.*, A/C.5/37/SR.34
58.	36th meeting, 16 November 1982 (see paras. 12, 29 and 30)	*Ibid.*, A/C.5/37/SR.36
59.	37th meeting, 17 November 1982 (see paras. 3 and 14)	*Ibid.*, A/C.5/37/SR.37
60.	40th meeting, 19 November 1982 (see paras. 4, 60 to 62, 77 and 96)	*Ibid.*, A/C.5/37/SR.40
61.	43rd meeting, 23 November 1982 (see paras. 13, 17 and 48)	*Ibid.*, A/C.5/37/SR.43
62.	44th meeting, 24 November 1982 (see paras. 15 and 16)	*Ibid.*, A/C.5/37/SR.44

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[1] Documents not reproduced. *[Note by the Registry.]*

63.	63rd meeting, 10 December 1982 (see para. 15)	*Ibid.*, A/C.5/37/SR.63
64.	67th meeting, 13 December 1982 (see paras. 7 to 10)	*Ibid.*, A/C.5/37/SR.67
65.	Report of the International Civil Service Commission: draft resolution sponsored by Canada, Finland, Ghana, Norway, Pakistan, Panama, and Sweden (9 December 1982) (see section IV, para. 5)	A/C.5/37/L.38

Verbatim record and a document[1] *of the plenary meeting of the General Assembly*

66.	Report of the International Civil Service Commission: Report of the Fifth Committee (16 December 1982)	A/37/768
67.	109th meeting, 17 December 1982 (see agenda item 112, pp. 26 to 27)	A/37/PV.109

B. Paragraph 5 of Section VI of General Assembly resolution 38/232

Documents[1] *of the Thirty-eighth Session of the General Assembly*

68.	Report of the International Civil Service Commission (1983) (see paras. 141 to 147)	*General Assembly, Official Records*, Thirty-eighth Session, Supplement No. 30, A/38/30

Summary records of meetings and a document[1] *of the Fifth Committee*

69.	31st meeting, 8 November 1983 (see para. 56)	*General Assembly, Official Records*, Thirty-eighth Session, Fifth Committee, A/C.5/38/SR.31
70.	33rd meeting, 10 November 1983 (see para. 35)	*Ibid.*, A/C.5/38/SR.33
71.	38th meeting, 15 November 1983 (see para. 73)	*Ibid.*, A/C.5/38/SR.38
72.	42nd meeting, 18 November 1983 (see para. 12)	*Ibid.*, A/C.5/38/SR.42
73.	61st meeting, 12 December 1983 (see para. 8)	*Ibid.*, A/C.5/38/SR.61
74.	66th meeting, 15 December 1983 (see paras. 38 and 41)	*Ibid.*, A/C.5/38/SR.66
75.	United Nations Common System: draft resolution sponsored by Australia,	A/C.5/38/L.17

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[1] Documents not reproduced. *[Note by the Registry.]*

Austria, Canada, Denmark, Egypt, Norway, Pakistan, Sweden and Venezuela (7 December 1983)

Verbatim record and a document[1] *of the plenary meeting of the General Assembly*

76.	United Nations Common System: Report of the Fifth Committee (18 December 1983)	A/38/745
77.	104th meeting, 20 December 1983 (see agenda item 117, pp. 32 to 33)	A/38/PV.104

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[1] Document not reproduced. *[Note by the Registry.]*

WRITTEN STATEMENTS

EXPOSÉS ÉCRITS

1. WRITTEN STATEMENT SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

I. BACKGROUND

A. Summary of the Facts

1. The facts relevant to the proceedings in the Administrative Tribunal of the United Nations to which Judgement No. 333 relates were outlined by the Tribunal in that Judgement (doc. No. 9, pp. 43-49, *supra*). In so far as they are relevant to the questions addressed to the Court in the present proceeding (see para. 43 below), the facts may be summarized as follows.

2. On 20 July 1977 the Deputy Permanent Representative of the Union of Soviet Socialist Republics (USSR) recommended to the Assistant Secretary-General for Personnel Services of the United Nations that a Soviet professional, Mr. Vladimir V. Yakimetz [the Applicant to whom Judgement No. 333 of the Tribunal relates][1] be appointed to the United Nations Secretariat. The Applicant had been previously employed by the United Nations Secretariat in 1969-1974 as a reviser (P-4) in the Russian Translation Service of the United Nations Secretariat in New York.

3. On 31 October 1977 the Appointment and Promotion Board recommended, and the Officer-in-Charge of the Office of Personnel Services thereafter approved on behalf of the Secretary-General, the appointment of the Applicant.

4. On 23 November 1977 the Deputy Chief, Secretariat Recruitment Service, Office of Personnel Services, wrote to the Applicant, c/o United Nations Information Centre in Moscow, on behalf of the Secretary-General of the United Nations, offering a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as a reviser in the Russian Service, Translation Division, Department of Conference Services.

5. On the same day, the Secretariat of the United Nations sent a Note Verbale to the Permanent Mission of the USSR, informing the Mission that the Organization had offered a five-year fixed-term appointment, on secondment from the USSR Government, to the Applicant.

6. On 28 December 1977 a letter of appointment was issued on behalf of the Respondent, was accepted by the Applicant on 24 January 1978, but took effect as from 27 December 1977; the letter of appointment did not mention secondment and, under item 5 ("Special Conditions"), specified "None".

7. On 5 October 1981 the Applicant was transferred as a Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs.

8. On 22 October 1982 the Secretariat of the United Nations requested the assistance of the Permanent Mission of the USSR in securing the consent of its

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[1] In the interest of uniformity of citation, Mr. Yakimetz will be referred to as the Applicant and the Secretary-General as the Respondent, since these are the terms used in Tribunal proceedings.

Government to the extension of the Applicant's secondment to the United Nations for one year, that is, up to 26 December 1983.

9. On 15 November 1982 the Permanent Mission communicated to the United Nations Secretariat its agreement to the extension of the contract of the Applicant to 26 December 1983.

10. On 6 December 1982 the Applicant was recommended for promotion to the Senior Officer (P-5) level by the Assistant Secretary-General, Programme Planning and Co-ordination Office.

11. On 8 December 1982 a Personnel Officer in the Office of Personnel Services, acting in the name of the Respondent issued a letter of appointment to the Applicant. This letter of appointment was signed by the Applicant on 9 December 1982. It provided for an extension of his appointment for one year, to take effect on 27 December 1982, specifying under item 5: "On secondment from the Government of the Union of Soviet Socialist Republics."

12. On 8 February 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, expressed his belief to the Applicant that it would be in the interests of the Office to have his services continue, and requested him to indicate at his earliest convenience whether he would be in a position to accept such an extension.

13. On 9 February 1983 the Applicant applied for asylum in the United States of America.

14. On 10 February 1983 the Applicant advised the Permanent Representative of the USSR to the United Nations that he was thereby resigning from his position with the Ministry of Foreign Affairs of the USSR and from all other official positions that he held and that he had made an application to the Government of the United States of America requesting asylum.

15. On 10 February 1983 the Applicant advised the Respondent that he intended to acquire permanent residence status in the United States of America, that he had made an application to the Government of the United States requesting asylum, that he had resigned from all official positions he held in the Government of the USSR; he also enclosed a copy of his resignation and assured the Respondent of his continued dedication and devotion to the United Nations and of his wish and intention to continue to perform all his obligations under his employment contract.

16. On 28 February 1983 the Director, Division of Personnel Administration, Office of Personnel Services, informed Applicant of the Respondent's decision to place him on special leave with full pay, effective 1 March 1983 and until further notice, in accordance with Staff Rule 105.2 *(a)*, and informed him that any other decision pertaining to his case would be taken by the Respondent at a later stage.

17. On 1 March 1983 the Applicant requested the Director, Divison of Personnel Administration, to advise him of the precise reasons as to why he had been placed on special leave as well as the effect of the leave on: his use of United Nations facilities; his continuation as a member of the Appointment and Promotion Committee and as Vice-Chairman of its Third Working Group; the promotion which was in process for him; and his career development at the United Nations including a possible extension of his appointment, and indicated that he would look forward to receiving written answers to his questions at the Director's convenience, but that in the meanwhile he would remain actively at his post.

18. On 11 March 1983 the Director, Division of Personnel Administration, Office of Personnel Services, advised the Applicant that in the exercise of his authority and responsibility as the chief administrative officer of the Organiza-

tion, the Respondent had determined that, at that juncture, and pending further review, it was in the best interests of the Organization that he not enter the premises of the United Nations, requested him to comply with this decision of the Respondent with immediate effect and until further notice, informed him that he would be advised in due course of any modification to this instruction, assured him that the Appointment and Promotion Board would give his promotion due consideration at an appropriate time in the course of its proceedings, indicated that consideration of the possible extension of his appointment at that time would be premature, and, finally, advised him that he might also wish to refer to Staff Rule 104.12 *(b)* (relating to fixed-term appointments and quoted in para. 66 below) which was applicable to this issue.

19. On 17 March 1983 the Applicant requested the Respondent to review the decision to place him on special leave, renewed his request for a written explanation as to why it was considered in the best interest of the Organization that he not enter the premises of the United Nations and advised that, on the advice of his counsel and under protest, he would comply with the Respondent's decision.

20. The Application to the Tribunal indicates that the Applicant continued to work on his assignments off the premises and, in due course, when the Programme Planning and Co-ordination Office was relocated in the Summer of 1983 from the Secretariat building to rented accommodation across the street, he was permitted officially to rejoin his section and to resume his duties.

21. On 29 June 1983 the Applicant was promoted to the Senior Officer (P-5) level with effect from 1 April 1983.

22. On 25 October 1983 the Applicant reminded the Assistant Secretary-General, Programme Planning and Co-ordination Office, that his fixed-term contract with the United Nations was due to expire on 26 December 1983, recalled their discussions on the prospects of his continuing employment in the Office, recited the elements which could contribute to his potential usefulness to the Organization and, finally, expressed his hope that the Assistant Secretary-General would find it possible on the basis of his performance to recommend a further extension of his contract with the United Nations or, even better, a career appointment.

23. On 8 November 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, acknowledged this reminder in connection with the expiration of Applicant's contract, commended his contribution to the work of that Office and also to the offices in which he had served before and indicated that, from his perspective as head of that Office, he found no difficulty in recommending a further extension of Applicant's contract and intended to do so at an appropriate time.

24. On 23 November 1983 the Deputy Chief, Staff Services, Office of Personnel Services, upon instruction by the Office of the Secretary-General, informed the Applicant that his fixed-term appointment would not be extended beyond its expiration date, i.e., 26 December 1983.

25. On 29 November 1983 the Applicant recalled to the Assistant Secretary-General for Personnel Services the information that the Applicant had recently received from the head of his Office and cited paragraph 5 of section IV of General Assembly resolution 37/126 which provides the staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment. The Applicant requested a three-month extension of his contract in order to allow the Panel on Discrimination and Other Grievances to look into his case and advised that this request was without prejudice to his claim to a longer-term appointment in the Organization.

26. On 2 December 1983 the Assistant Secretary-General, Programme Planning and Co-ordination Office, recalled to the Assistant Secretary-General for Personnel Services that the former had recently assured the Applicant that it was intended to recommend a further extension of his contract, reiterated the view that it was in the best interest of his Office to continue to have the services of the Applicant and strongly recommended that his appointment be extended.

27. On 13 December 1983 the Applicant's United Nations counsel, chosen by him from the panel of counsel comprised of United Nations staff members, wrote to the Secretary-General citing paragraph 5 of section IV of General Assembly resolution 37/126, Staff Regulations 4.2 and 4.4, Staff Rule 104.14 *(a)* (ii) and Article 101, paragraph 3, of the Charter, recalled his service record and the evaluations of his supervisors, claimed an expectancy that he would be given every reasonable consideration for a career appointment, postulated a violation of Article 100 of the Charter and finally requested that his name be forwarded to the appropriate Appointment and Promotion body for reasonable consideration.

28. On 21 December 1983 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General had given careful consideration to his request of 13 December 1983, distinguished his situation from that of "most staff members" with comparable service records in connection with his claim to an expectancy, cited Staff Rule 104.12 *(b)* and the terms of his appointment, maintained the position stated on 23 November 1983, declined to forward his case to the Appointment and Promotion Board and agreed to the direct submission of any appeal to the United Nations Administrative Tribunal (the Administrative Tribunal).

29. On 26 December 1983 the Applicant's fixed-term appointment expired in accordance with its terms and he was duly separated from service with the United Nations.

B. The Previous Proceedings

(i) *The Administrative Tribunal: Case No. 322*

30. On 6 January 1984 the Applicant filed an Application with the Administrative Tribunal, requesting the Tribunal:

> "A. To consider his case at the Spring 1984 session of the Tribunal.
>
> B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to *(sic)* the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> D. To adjudge and declare that he had an expectancy of further employment.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.
>
> F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment.
>
> G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.
>
> H. To order reimbursement of expenses, if any, reasonably incurred by

the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings." (Doc. No. 19, sec. II.)

31. On 14 March 1984 the Respondent filed his Answer in which he made the following observations on the Applicant's pleas:

> "*(a)* with respect to Applicant's plea *A*, Respondent joins in Applicant's request that the Tribunal consider the case at its next ordinary session (May 1984);
>
> *(b)* with respect to plea *B*, Respondent draws to the Tribunal's attention the fact that there was no administrative decision '*not to consider* an extension to the Applicant's United Nations service (emphasis supplied)';
>
> *(c)* with respect to plea *C*, Respondent does not dispute that it was within the Secretary-General's authority and discretion to re-appoint the Applicant after the expiry of his contract;
>
> *(d)* with respect to plea *D*, Respondent requests the Tribunal to conclude that Applicant had no legal expectancy of further employment;
>
> *(e)* with respect to plea *E*, Respondent requests the Tribunal to conclude that Applicant had no 'right' to *favourable* consideration for a career appointment and did, in fact, receive such consideration as was *reasonable*;
>
> *(f)* with respect to plea *F*, Respondent draws the Tribunal's attention to paragraphs 16, 18 and 24 [of doc. No. 21] and requests the Tribunal to conclude that, the Secretary-General having considered the case and having decided that further appointment was not in the Organization's interest, no further procedure was requisite and there was moreover in those circumstances no appropriate 'body' to consider him for a career appointment;
>
> *(g)* with respect to plea *G*, Respondent submits that Applicant had no entitlement to employment with the United Nations after expiry of his contract and, hence, no entitlement to salary thereafter; and
>
> *(h)* with respect to plea *H*, Respondent recalls the Tribunal's policy on costs as set forth in its general statement of 14 December 1950, and notes that Applicant was represented by counsel chosen from the panel of counsel comprised of United Nations staff members, and that secretarial services were provided by the Organization for purposes of the Tribunal's proceedings." (Doc. No. 21, para. 27.)

32. On 17 April 1984 the Applicant filed Written Observations on the Respondent's Answer (doc. No. 22).

33. As no request for oral proceedings had been made and as the presiding member did not decide that any should be held (Rules of the Administrative Tribunal of the United Nations: doc. No. 16, Art. 15) the case was decided on the written pleadings.

34. On 8 June 1984 the Administrative Tribunal, having deliberated from 11 May 1984, issued its Judgement No. 333 (doc. No. 9), to which the present proceeding relates.

35. The Tribunal noted the principal contentions of the parties, as follows:

> "Whereas the Applicant's principal contentions are:
>
> 1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:
>
> *(a)* the applicant was not in any legally cognizable sense on secondment;

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(b) after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;
(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations.

2. The Applicant had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment.
3. The Applicant was denied the reasonable consideration for further employment to which he had a right.

Whereas the Respondent's principal contentions are:

1. The Applicant has no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract:

(a) the fixed-term contract excludes any expectancy;
(b) no circumstances outside the scope of the contract gave rise to legally cognizable expectations:

  (i) the circumstances relating to secondment could not have created an expectancy. The separation from government service during period of United Nations appointment did not result in new terms of contract with the United Nations;
  (ii) the commendations by supervisors did not commit the Secretary-General to extend the appointment. The pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled;
  (iii) General Assembly resolution 37/126, IV, paragraph 5, did not effect a change in procedure on appointment.

2. The Secretary-General's decision against re-appointment was within his sole authority under the Charter and the Staff Regulations:

(a) in reaching his decision, the Secretary-General took into account all the circumstances in the case;
(b) in taking his decision in the case, the Secretary-General acted in the interest of the Organization." (Doc. No. 9, pp. 49 to 50, *supra.*)

36. The Tribunal then identified the legal issues in the case, as follows:

"*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;
(b) whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads:

'*Decides that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment*'

has been carried out;
(c) the consequences of the application of United Nations rules and regulations in relation to the United Nations law on resident status and citizenship." (Doc. No. 9, p. 50, *supra*, para. I.)

37. On issue *(a)*, the Tribunal unanimously concluded that

> "all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the USSR" (doc. No. 9, p. 51, *supra*, para. III and dissenting opinion, p. 56, *supra*, para. 1)

and that

> "it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (doc. No. 9, p. 51, *supra*, para. VI and p. 56, *supra*, dissenting opinion, para. 1).

38. On issue *(b)*, the Tribunal majority concluded that "the plain and simple inference is that the Respondent had given the required (i.e., 'every reasonable') consideration for a career appointment for the Applicant" (doc. No. 9, p. 54, *supra*, para. XVI). The Statement by Mr. Ustor noted that "the Applicant was in [his] view not eligible for consideration for a career appointment" (doc. No. 9, p. 56, *supra*, Statement by Mr. Ustor, third para.). Although Mr. Kean agreed with the rejection of the Applicant's claim in so far as it was based upon expectancy of a further appointment, he considered that "the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment" (doc. No. 9, p. 59, *supra*, dissenting opinion, para. 12).

39. On issue *(c)*, the Tribunal concluded that "there was apparently no immediate problem" (doc. No. 9, p. 52, *supra*, para. XII).

(ii) *The Committee on Applications for Review of Administrative Tribunal Judgements: Application No. 32*

40. On 23 July 1984 the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee) received an application from the Applicant (doc. No. 1), in accordance with Article 11, paragraph 1, of the Statute of the Administrative Tribunal (doc. No. 16). The Applicant alleged that the Tribunal had exceeded its jurisdiction and competence, that the Tribunal had failed to exercise jurisdiction vested in it; that the Judgement of the Tribunal had erred on questions of law relating to provisions of the United Nations Charter and that the Tribunal had committed fundamental errors of procedure which occasioned a failure of justice.

41. On 10 August 1984 the Respondent filed his comments (doc. No. 4) on the Application. The Respondent submitted that the Tribunal had properly exercised its jurisdiction and competence under Article 2 of its Statute when it heard and passed judgement on the Application (to the Tribunal) in the manner which is reflected in its Judgement in the case, that the Tribunal had correctly interpreted applicable provisions of the Charter in favour of the Respondent who properly discharged his responsibilities as chief administrative officer of the Organization and that the Tribunal had not committed an error, let alone a fundamental error of procedure which could have occasioned a failure of justice.

42. On 21 August 1984 the Committee was convened to consider the Application. The Committee met for this purpose in closed meetings on 21, 22 and 23 August 1984 (doc. No. 7, para. 7) and in a public meeting on 28 August (doc. No. 8). In compliance with the provisions of paragraph 1 of Article IX of its

rules of procedure (doc. No. 11), the Committee took a decision in respect of each of the four grounds invoked by the Applicant. Each decision was taken by a roll-call vote and the results of the voting were as follows:

> "(1) Is there a substantial basis for the application on the ground that the Tribunal has exceeded its jurisdiction? There were no votes in favour; 25 members voted against: Algeria, Belgium, Bhutan, Burundi, Canada, Colombia, Czechoslovakia, France, German Democratic Republic, Guyana, Japan, Lebanon, Liberia, Libyan Arab Jamahiriya, Nepal, Norway, Panama, Sierra Leone, Singapore, Sudan, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United States and Venezuela; three members abstained: Pakistan, Swaziland and Thailand. The Committee thus concluded that there was no substantial basis for the application on the ground just stated.
>
> (2) Is there a substantial basis for the Application on the ground that the Tribunal has failed to exercise jurisdiction vested in it? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the second ground.
>
> (3) Is there a substantial basis for the Application on the ground that the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations? Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Liberia, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, the United Kingdom, the United States and Venezuela; nine members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, the German Democratic Republic, the Libyan Arab Jamahiriya, Nepal, Tunisia and the USSR; three members of the Committee abstained: Lebanon, Pakistan and Thailand. There being 16 votes in favour, 9 against and 3 abstentions, the Committee concluded that there was a substantial basis for the Application on the third ground.
>
> (4) Is there a substantial basis for the Application on the ground that the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice? Eleven members of the Committee voted in favour: Belgium, Canada, Colombia, France, Japan, Liberia, Norway, Panama, the United Kingdom, the United States and Venezuela; 13 members of the Committee voted against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Guyana, Libyan Arab Jamahiriya, Nepal, Sierra Leone, Singapore, Sudan, Tunisia and the USSR; four members of the Committee abstained: Lebanon, Pakistan, Swaziland and Thailand. There being 11 votes in favour, 13 against, with 4 abstentions, the Committee concluded that there was no substantial basis for the Application on the ground just stated." (Doc. No. 8, pp. 33 to 35, *supra*.)

43. At the conclusion of its deliberations on the Application, the Committee adopted the following decision:

> "The Committee on Applications for Review of Administrative Tribunal Judgements at the 4th meeting of its twenty-fourth session on 23 August 1984 decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:
>
> (1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?" (Doc. No. 6.)

Sixteen members of the Committee voted in favour: Belgium, Canada, Colombia, France, Guyana, Japan, Norway, Panama, Sierra Leone, Singapore, Sudan, Swaziland, Thailand, United Kingdom, United States and Venezuela; nine members voted against: Algeria, Bhutan, Burundi, Czechoslovakia, German Democratic Republic, Libyan Arab Jamahiriya, Nepal, Tunisia and USSR; one member abstained: Pakistan (Doc. No. 8, p. 35, *supra*). There being 16 votes in favour, 9 against and 1 abstention, the decision was adopted. After the decision the following members of the Committee made statements: Bhutan, France, USSR, United States and Czechoslovakia (Doc. No. 8, pp. 35-42, *supra*)[1].

II. THE QUESTIONS ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

1. Question: In Its Judgement No. 333 of 8 June 1984 (AT/DEC/333), Did the United Nations Administrative Tribunal Fail to Exercise Jurisdiction Vested in It by not Responding to the Question Whether a Legal Impediment Existed to the Further Employment in the United Nations of the Applicant after the Expiry of His Contract on 26 December 1983?

A. INTRODUCTION

44. In order to ascertain whether the Tribunal had failed to exercise its jurisdiction it is first necessary to define that jurisdiction and then to examine the actual decision on the basis of the facts and pleas presented to it.

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[1] Although Panama made a Statement (doc. No. 7, para. 15), it was not recorded in the Verbatim Record (doc. No. 8) as the Statement related only to a technical correction relating to the announcement of the voting record.

(i) *Jurisdiction of the Administrative Tribunal*

45. Paragraph 1 of Article 2 of the Statute of the Administrative Tribunal (doc. No. 16) provides as follows:

> "1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of the alleged non-observance, including the staff pension regulations."

46. Paragraph 1 of Article 9 of the Statute provides, *inter alia*, as follows:

> "1. If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; . . ."

(ii) *The Court's Approach to Allegations of Failure to Exercise Jurisdiction*

47. In its Advisory Opinion of 12 July 1973, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166) (hereinafter the "Fasla Opinion"), the Court declared that:

> "the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded." (*I.C.J. Reports 1973*, pp. 187-188, para. 47.)

48. The Court cited this statement in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325 at p. 356, para. 58) (hereinafter the "Mortished Opinion"). Furthermore, the Court gave, in its Fasla Opinion, detailed guidance in evaluating a challenge that the Tribunal failed to exercise jurisdiction vested in it:

> "51. In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue. No doubt, there may be borderline cases where it may be difficult to assess whether the Tribunal has in any true sense con-

> sidered and determined the exercise of relevant jurisdictional powers. But that does not alter the duty of the Court to appreciate in each instance, in the light of all pertinent elements, whether the Tribunal did or did not in fact exercise with respect to the case the powers vested in it and relevant to its decision." (*I.C.J. Reports 1973*, pp. 189-190, para. 51.)

The Court cautioned, however, that:

> "The test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgement: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefor." (*I.C.J. Reports 1973*, p. 193, para. 56.)

49. In this context it ought to be noted that the jurisdiction of the Tribunal is limited to determining whether contracts or terms of appointment have been observed. The Tribunal exercises its jurisdiction if it examines the substance of an Applicant's allegations or pleas and determines whether those allegations constitute "non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members" (see para. 45 above).

B. The Issue in the Present Case

50. The facts of this case, including the Pleas and arguments submitted to the Tribunal by the Applicant together with those of the Respondent, are set out in Part I of this Written Statement (see paras. 1 to 35 above). The real issue between the parties—and that upon which the Tribunal adjudicated—was whether the Applicant's rights were violated by the decision of the Respondent not to grant him a further appointment after 26 December 1983, be it a fixed-term appointment on secondment, a fixed-term appointment or a career appointment (the essential characteristics of these appointments are described in the Appendix).

(i) *The Application to the Tribunal and the Tribunal's Judgement*

51. The Tribunal commenced its Judgement by setting out the Applicant's Pleas, including the Plea directly relevant to the first question addressed by the Committee to the Court for an advisory opinion, i.e., Applicant's Plea C, "to adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983" (Judgement, p. 43, *supra*; doc. No. 9).

52. The Tribunal summarized the Applicant's principal contentions in support of this plea as follows:

> "1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:
>
> *(a)* the Applicant was not in any legally cognizable sense on secondment;
> *(b)* after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;

(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations." (Judgement, p. 49, *supra*; doc. No. 9.)

53. The Tribunal then assimilated the Applicant's Plea and his contentions in support thereof to its analysis of what it had identified as the legal issues involved in that Plea and supporting contentions, namely:

> "*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;
>
> *(b)* whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads:
>
> '*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'
>
> has been carried out." (Judgement, p. 50, *supra*, para. I; doc. No. 9.)

54. Pursuant to Article 2 (1) of its Statute, it was not incumbent upon the Tribunal to give an advisory opinion on the Plea, but rather to examine the Plea to determine the legal issues it contained that were relevant to the Tribunal's jurisdiction. The Tribunal did this by identifying that the Plea entailed an allegation that the Applicant had a legal expectancy for further employment and involved determining whether the Applicant had been given every reasonable consideration for a career appointment pursuant to paragraph 5 of section IV of resolution 37/126 (Judgement, p. 50, *supra*, para. I; doc. No. 9). The Tribunal carried out this function by examining and adjudicating upon those issues and concluding that the Applicant's terms of employment were not violated by the failure to offer him a further appointment.

(ii) *The Application to the Committee and Its Outcome*

55. The Application to the Committee argued that the Tribunal failed to exercise the jurisdiction vested in it by its Statute by allegedly failing to respond to the Plea to determine whether a legal impediment existed to his further employment with the United Nations after the expiration of his appointment on 26 December 1983 (Application to Committee, sec. II; doc. No. 1).

56. The Committee requested the Court to advise whether the Tribunal failed to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment of the Applicant in the United Nations after the expiry of his contract on 26 December 1983 (Decision of Committee; doc. No. 6). Most statements made at the public meeting of the Committee were against submission of the question to the Court (doc. No. 8) and therefore are not directly relevant to interpretation of that question.

C. RESPONSE TO QUESTION POSED BY THE COMMITTEE

57. This Written Statement will submit: first, that the question to which the Committee referred was not in issue between the parties; second, that the Tribunal does not have jurisdiction to answer or advise on abstract questions; and third, that an answer, in terms, to the question was not required in logic or in law.

(i) *Committee's Question not at Issue between Parties*

58. At the outset, it should be noted that the question whether a legal impediment existed to the further employment of the Applicant after the expiry of his contract of employment on 26 December 1983 (Decision of Committee; doc. No. 6) was, in reality, not at issue between the parties. This is so because the Respondent indicated to the Tribunal that he did "not dispute that it was within the Secretary-General's authority and discretion to re-appoint the Applicant after the expiry of his contract" (Respondent's Answer to Tribunal, para. 27 *(c)*; doc. No. 21). Consequently, there appears to have been no call for the Tribunal to have dealt with this question explicitly.

(ii) *The Tribunal Is not Obligated to Answer Abstract Questions*

59. Consistent with the limited jurisdiction of the Tribunal (see paras. 45 to 46 above) Article 9 provides that the Tribunal may only rescind the contested decision or order specific performance of an obligation and, at the same time, must fix damages in lieu of further action if the Secretary-General decides to maintain the decision in the interests of the Organization. It follows that the Tribunal does not have the power to give advisory opinions and so does not have to—and indeed cannot—respond to all questions posed to it by Applicants but must limit itself to pass judgement upon allegations (or pleas) of non-observance of contracts and terms of appointment. The Tribunal must, therefore, analyse any pleas submitted to it to determine whether those pleas involve an allegation of non-observance and, if so, then pass judgement on those allegations.

60. In other words, the Tribunal cannot simply answer in terms questions and pleas submitted to it but must determine whether an issue exists upon which it is competent to adjudicate pursuant to Article 2 of its Statute. This is the reason why the Tribunal opened its Judgement by associating the relevant arguments with the legal issues raised by Mr. Yakimetz's Plea that it "adjudge and declare" that no legal impediment existed to his further employment by the United Nations (Judgement, p. 50, *supra*, para. 1; doc. No. 9) and then adjudicating upon the Application on the basis of those legal issues.

(iii) *Question Was not Relevant to the Tribunal's Adjudication*

61. A determination by the Tribunal on the existence or otherwise of a legal impediment to the Applicant's further employment would be necessary *if* he had a legal expectancy for further employment and *if* he had not been given "every reasonable consideration" for a career appointment pursuant to paragraph 5 of section IV of resolution 37/126. If those premises were true the legal rights of the Applicant would have been violated and he would have been entitled to the remedies provided in Article 9 of the Tribunal's Statute, unless the Tribunal determined that there was a legal impediment to his further employment. However, as discussed in turn below, the Tribunal found that neither of these pre-conditions existed that would have required an answer in terms to the question posed by the Applicant. Since neither of these pre-conditions existed it follows logically that no answer is required.

(a) *The Tribunal found no expectancy for further employment*

62. The Tribunal rejected the contention of the Applicant that he was not on secondment by finding that "it can be concluded that all three parties (the

Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being on secondment from the Government of the USSR" (Judgement, p. 51, *supra*, para. III; see also p. 51, *supra*, para. VII; doc. No. 9).

63. The Tribunal then considered whether the Applicant had a legal expectancy to a renewal of that fixed-term appointment *on secondment* and concluded that such expectancy did not exist:

> "IV. In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances. This accords with the analysis of secondment in the Tribunal's Judgement No. 92 *(Higgins)* as requiring the agreement of the 'three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned' (para. VI) and with the decision of the Tribunal in paragraph V of Judgement No. 192 *(Levcik)* that 'any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of the three parties involved'." (Judgement, p. 51, *supra*, para. IV; doc. No. 9.)

64. The Tribunal thereupon examined the Applicant's contentions that his resignation from the service of the Government of the USSR on 10 February 1983 created a new contractual relationship between himself and the United Nations, which relationship was accepted by the latter (Judgement, p. 52, *supra*, para. VIII; doc. No. 9). After reviewing the circumstances surrounding his resignation (Judgement, pp. 52 to 53, *supra*, paras. X to XII; doc. No. 9), the Tribunal reached the following findings of fact:

> ". . . the Tribunal concludes that during the period of his service with the United Nations the Applicant was under secondment which, as already stated, could not be modified except with the consent of all three parties and that no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship" (Judgement, p. 53, *supra*, para. XIII; doc. No. 9).

65. Having reached the conclusion that extension of the fixed-term appointment on secondment was not possible without the consent of all three parties —which conclusion is not disputed by the Applicant—the Tribunal examined whether the refusal to grant the Applicant a further appointment constituted a non-observance of his contract of employment or violated the terms of his appointment.

66. The Applicant's final fixed-term appointment provided, *inter alia*, as follows:

> "You are hereby offered a FIXED-TERM APPOINTMENT in the Secretariat of the United Nations, in accordance with the terms and conditions specified below, and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules . . .
>
> . . . .
>
> 3. *Tenure of appointment*
>
> This temporary appointment is for a fixed-term of one year from the

14

effective date of appointment shown above. It therefore expires on the twenty-sixth day of December 1983.

. . . The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations." (Letter of Appointment; doc. No. 20, Annex 19.)

67. This language is based on Staff Rule 104.12 which provides, in relevant parts, as follows:

> "Rule 104.12
>
> TEMPORARY APPOINTMENTS
>
> On recruitment staff members may be granted one of the following types of temporary appointments: probationary appointment, fixed-term appointment, or indefinite appointment.
>
> *(a)* Probationary appointment
>
> . . . .
>
> *(b)* Fixed-term appointment
>
> The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.
>
> *(c)* Indefinite appointments
>
> . . ." (See UN Staff Rules, doc. No. 18.)

68. The appointment also specified, under Special Conditions, that the appointment was "On secondment from the Government of the Union of Soviet Socialist Republics" (Letter of Appointment; doc. No. 20, Annex 19).

69. The Applicant's contract of employment thus clearly stated that no legal expectancy to further employment existed. However, the Tribunal's jurisprudence recognizes that despite such unequivocal contractual terms, circumstances may arise which create a legally enforceable expectancy to further employment (Judgement, p. 51, *supra*, para. VI (doc. No. 9) citing Judgement No. 142 *(Bhattacharyya)* (doc. No. 23) and Judgement No. 205 *(El-Naggar)* (doc. No. 24)).

70. The Tribunal examined all the circumstances of the case and concluded that, in the present case, no circumstances existed to create a legal expectancy of future employment:

> "Applying the principles followed in Judgements Nos. 142 *(Bhattacharyya)* and 205 *(El-Naggar)*, it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment." (Judgement, p. 51, *supra*, para. VI; doc. No. 9.)

71. The separate statement of Mr. Ustor, which is not part of the majority Judgement, did not dispute the finding that, in accordance with the Tribunal's jurisprudence on legal expectancy, the Applicant did not have a legal expectancy

to a further appointment. The statement, however, noted that Applicant was not in any event entitled to a career appointment because of the special nature of a fixed-term appointment on secondment (Judgement; p. 56, *supra*, statement by Mr. Ustor; doc. No. 9).

72. Mr. Kean, although delivering a dissenting opinion, agreed with the majority that the Applicant was on secondment during his last appointment and that renewal of a fixed-term appointment *on secondment* would require consent of all parties. Mr. Kean also agreed with the majority that there was no expectancy of further employment (Judgement, p. 56, *supra*, dissenting opinion of Mr. Arnold Kean, para. 1; doc. No. 9). Mr. Kean differed with the majority on whether the Applicant received "every reasonable consideration" for a further appointment (see paras. 78 to 79 below).

73. The Tribunal concluded that the Applicant had no enforceable legal right to further employment in the United Nations. It necessarily follows that the failure by the Respondent to offer him further employment did not violate his terms of appointment and that, therefore, the question of a possible legal impediment to such appointment did not arise.

(b) *The Tribunal found that every reasonable consideration was given the Applicant for a career appointment*

74. The plain terms of the Applicant's appointment were also affected by paragraph 5 of section IV of General Assembly resolution 37/126 (doc. No. 12) which provides that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". The Tribunal held that the Applicant was entitled to the benefit of that resolution and concluded that this consideration had, *in fact*, been given (Judgement, pp. 53 to 54, *supra*, paras. XIV to XVIII; doc. No. 9).

75. The Tribunal then examined the manner in which the Respondent exercised his discretion and found as a fact that:

> ". . . there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter. Indeed, he states all throughout that the measures he took were in the interests of the United Nations taking into account all the facts, 'together with the representations to diverse effect by the permanent missions of two member States'." (Judgement, p. 55, *supra*, para. XIX; doc. No. 9.)

76. The Tribunal concluded by expressing its

> "dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution. However, this omission on the part of the Respondent has not caused any discernible injury to the Applicant and he is therefore not entitled to any monetary relief." (Judgement, p. 55, *supra*, para. XX; doc. No. 9.)

77. Mr. Ustor implicitly agreed with the factual conclusion of the majority that "every reasonable consideration" for a career appointment mandated by

resolution 37/126 had been given to the Applicant. Mr. Ustor was, however, of the opinion that such consideration was not required by resolution 37/126, which resolution he considered inapplicable to fixed-term appointments on secondment (Judgement, p. 56, *supra*, separate statement; doc. No. 9).

78. Mr. Kean agreed that paragraph 5 of section IV of resolution 37/126 applied to the Applicant, who was thus entitled to "every reasonable consideration" for a career appointment (Judgement, p. 56, *supra*, dissenting opinion of Mr. Kean, paras. 2 and 3). Mr. Kean, however, differed from the majority in that he interpreted the letter of 21 December 1983 from the Assistant Secretary-General for Personnel Services to the Applicant (doc. No. 20, Annex 40) as establishing that the Secretary-General was of the opinion that the Applicant was not entitled to be considered for a career appointment because he had been on secondment (Judgement, p. 57, *supra*, paras. 4 to 7; doc. No. 9).

79. Having found, as a fact, that the Applicant had been accorded "every reasonable consideration" for a career appointment, albeit accompanied by an expression of dissatisfaction that appropriate written records of such consideration were not kept, the Tribunal therefore was not obliged to go on to speculate on whether the Respondent had the legal power to appoint the Applicant, had Respondent been so inclined to do so.

D. CONCLUSIONS

80. First, there was no call for the Tribunal to respond in terms to the question whether a legal impediment existed to the further employment of the Applicant after 26 December 1983 since this question was not at issue between the parties (see para. 58 above).

81. Second, the question to which the Committee referred was an abstract one, to which the Tribunal was not obliged to reply explicitly, as long as it adjudicated upon Applicant's claim that the terms of his appointment or his contract had been violated by the failure to re-appoint him (see paras. 59-60 above).

82. An answer to the question would have been required only if the Tribunal held that there was a legal expectancy for further employment but that due consideration had not been given thereto. As the Tribunal found as a matter of fact that Applicant had no such expectancy it was not necessary, in order to judge the claim submitted to it, to determine whether the Respondent could have declined to appoint Applicant without violating his rights on the basis that a legal impediment to any further employment existed (see paras. 61 to 73 above).

83. Furthermore, the Tribunal also found as a matter of fact that Applicant had received "every reasonable consideration" for a career appointment pursuant to resolution 37/126. This finding too made irrelevant an enquiry into whether a failure to give such consideration could have been justified on the basis that a legal impediment to future employment existed (see paras. 74 to 79 above).

84. Thus, in making those determinations the Tribunal exercised the jurisdiction vested in it by Article 2 of its Statute to adjudicate upon allegations of non-observance of contracts or terms of employment. The question of whether that determination might be contested is immaterial to the issue of exercise of jurisdiction.

2. Question: Did the United Nations Administrative Tribunal, in the Same Judgement No. 333, Err on Questions of Law relating to Provisions of the Charter of the United Nations?

A. INTRODUCTION

85. The question presented to the Court by the Committee does not specify the provisions of the Charter upon which the Tribunal may have erred. The Application submitted by the Applicant to the Committee (doc. No. 1), however, referred to five specific provisions in detail and mentioned a sixth provision. Therefore, this Written Statement will consider the Tribunal's Judgement in relation to each of those provisions, after first duly taking into account the approach of this Court in relation to errors on questions of law relating to provisions of the Charter and, secondly, after briefly reviewing the Judgement in relation to the Charter as a whole.

(i) *The Court's Approach to Questions concerning Error of Law relating to Provisions of the Charter*

86. In its *Mortished* Opinion the Court set forth a definition of its role in examining this ground of objection by observing that it must determine

> "the scope of the enquiry to be conducted by the Court in order that it may decide whether the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations" (*I.C.J. Reports 1982*, p. 357, para. 62).

The Court then defined this task as follows:

> "64. In any event, the Court clearly could not decide whether a judgement about the interpretation of Staff Regulations or Staff Rules has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide. While to that extent the Court has therefore to examine the Tribunal's decision on the merits, it is not the business of the Court, after making that examination, itself to get involved in the question of the proper interpretation of the Staff Regulations and Staff Rules, as such, further than is strictly necessary in order to judge whether the interpretation adopted by the Tribunal is in contradiction with the requirements of the provisions of the Charter of the United Nations.
>
> 65. This conclusion, dictated by the considerations of principle noted above, is also in accord with the actual words of the ground of objection mentioned in Article 11 of the Tribunal's Statute which speaks, not of 'error of law' but of error 'on a question of law relating to the provisions of the Charter of the United Nations', and these latter words cannot be other than words of qualification. It is true that the regulations and rules applied by the Administrative Tribunal must derive their validity from the provisions of the Charter. Indeed, all valid regulations and rules adopted by a United Nations organ cannot be other than based on the provisions of the Charter. It does not follow, however, that every question of the interpretation or application of those regulations and rules is a question of law relating to the provisions of the Charter. Nor indeed would the words of Article 101 of the Charter ordinarily be of any assistance or pertinence in the task of interpreting a rule or regulation. Accordingly, it would be

quite mistaken to suppose that, because the law applied by the Tribunal, or indeed the law applied by any organ of the United Nations, derives its ultimate validity from the Charter, the ground of Article 11 now under examination means that an objection to any interpretation by the Tribunal of staff rules and regulations is a matter for an advisory opinion of the Court." (*I.C.J. Reports 1982*, p. 358, paras. 64-65.)

(ii) *Relationship between the Judgement and the Charter*

87. The Pleas submitted by the Applicant to the Tribunal do not refer explicitly to provisions of the Charter (para. 30 above). The only ones that could conceivably involve any questions of law relating to provisions of the Charter are Pleas B, C and E, which provide as follows:

> "B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment." (Judgement, p. 43, *supra*, doc. No. 9.)

88. The Tribunal, after determining the legal issues raised by the Pleas, concluded that the non-renewal of the Applicant's appointment and the failure to convert his appointment to some other type of appointment did not violate his rights on the following grounds:

(a) the Applicant's fixed-term appointment on secondment, which the Tribunal found expired on 26 December 1983, would have required, as a matter of law, consent of all three parties to it for its renewal (Judgement, p. 53, *supra*, para. XIII; doc. No. 9);

(b) the Applicant did not have an expectancy of renewal because it did not appear that the Applicant had produced evidence of circumstances sufficient to establish that he had such an expectancy following the end of his fixed-term appointment (Judgement, p. 51, *supra*, para. VI; doc. No. 9);

(c) the Applicant received "every reasonable consideration" for a career appointment to which he was entitled under paragraph 5 of section IV of General Assembly resolution 37/126 during the process whereby the Respondent decided not to grant him a career appointment (Judgement, pp. 53 to 55, *supra*, paras. XIV to XVIII; doc. No. 9).

89. It is submitted that these conclusions of the Tribunal, in support of its decision, do not explicitly or even implicitly relate to questions of law involving provisions of the Charter.

(iii) *The Application to the Committee and Its Outcome*

90. The Application to the Committee alleged that the Tribunal's Judgement conflicts with the following provisions of the United Nations Charter: Article 101, paragraph 1; Article 100, paragraph 1; Article 101, paragraph 3; Article 8; and Article 2, paragraph 1, together with Article 100, paragraph 2 (Application to Committee, paras. 17 to 33; doc. No. 1).

91. The Committee requested the Court to advise whether the Tribunal erred

on questions of law relating to provisions of the Charter (doc. No. 6). Most statements made at the public meeting of the Committee were against submission of the question to the Court (doc. No. 8) and therefore are not directly relevant to interpretation of the question.

B. THE JUDGEMENT IN RELATION TO THE CHARTER PROVISIONS CITED IN THE APPLICATION TO THE COMMITTEE

(i) *Article 101, Paragraph 1, of the United Nations Charter*

92. Article 101, paragraph 1, of the Charter provides as follows: "1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."

93. The Application to the Committee argued that the Tribunal's Judgement was "inconsistent" with this provision of the Charter because the Tribunal did not find that the Secretary-General had disregarded the General Assembly's sovereign role because he had failed to provide administrative instructions to create machinery to implement paragraph 5 of section IV of resolution 37/126. The Application also argued that the Judgement erred by concluding, without supporting evidence, that the Respondent personally considered the Applicant's case (see doc. No. 1, paras. 17 to 19).

94. This argument is misconceived because it suggests, incorrectly, that the Respondent explicitly or implicitly asserted that he could disregard resolution 37/126 and also that the Tribunal's Judgement, in some way, upheld such a position. In fact, the Respondent asserted that he had complied with the resolution and the Tribunal determined that he did so.

95. The Respondent does not dispute that he has a responsibility to implement General Assembly resolutions (see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 60). However, as was pointed out by this Court in the *Mortished* Opinion, the mere fact that a resolution "decides" a particular point of personnel policy does not give to any individual staff member the right to have the resolution applied by way of any particular machinery or in any particular way (*Mortished* Opinion, *I.C.J. Reports 1982*, pp. 359-360, paras. 66-68). The Respondent is, of course, obliged to apply the resolution in substance but in implementing it, until he provides otherwise, is entitled to adopt informal procedures rather than use the formal advisory machinery established by the Staff Rules such as the Appointment and Promotion Board (see para. 28 above and see Staff Rule 104.14; doc. No. 18). In the present case, the Tribunal found, as a fact, that the Respondent had considered the Applicant for a career appointment under resolution 37/126 and consequently not only had the Applicant's rights been respected but the Respondent had respected the sovereign rule-making power of the General Assembly.

96. Indeed, resolution 37/126 did not affect the Respondent's discretionary power of appointment but merely obliged him to give "every reasonable consideration" for a career appointment to staff on fixed-term appointments with more than five years of continuous good service. In other words, the Respondent must exercise his discretion as chief administrative officer of the Organization and give "every reasonable consideration" to such staff, having regard to the interests of the Organization for which he plays that role (Art. 97 of the Charter), to the qualities of the staff member (Art. 101, para. 3, of the Charter and Staff Regulation 4.2), to the need to recruit staff on as wide a geographical basis as possible (Art. 101, para. 3, of the Charter and Staff Regulation 4.2) and

to the qualities of existing staff and the need to secure fresh talent (Staff Regulation 4.4). Such decision had, of course, to be made without distinction as to race, sex or religion (Art. 8, para. 2, of the Charter and Staff Regulation 4.3). This is precisely what occurred in relation to the Applicant. The Tribunal found that all the circumstances were considered and that the Respondent had properly concluded that any further appointment of the Applicant would not be in the interests of the Organization.

97. The Applicant also argues with respect to Article 101, paragraph 1, that the Tribunal was in error in finding, "without supporting evidence", that he had been given every reasonable consideration for a career appointment (Application to the Committee, para. 18; doc. No. 1). This assertion, however, aside from raising merely a procedural and not a Charter question, overlooks the statement of the Respondent that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). The dissenting opinion evaluated the facts differently but such finding, even if it had been a finding of the Tribunal, also does not raise a question of law relating to Article 101, paragraph 1, of the Charter.

(ii) *Article 100, Paragraph 1, of the United Nations Charter*

98. Article 100, paragraph 1, of the United Nations Charter provides as follows:

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

99. The Application to the Committee argued that this provision, although permitting the Secretary-General to consider the views of governments, precludes him from being bound by them and alleged that the Respondent in this case was merely carrying out the instructions of a government when he refused to offer a new appointment to the Applicant and argued that the Tribunal committed an error of law relating to the Charter by not so holding (Application to Committee, paras. 20-22; doc. No. 1).

100. This argument is misconceived in fact and in law. It is misconceived in fact because the Secretary-General did not take instructions from a member State (see para. 75 above). It is misconceived in law because it suggests that the Secretary-General is precluded from taking into consideration formal representations made to him in his official capacity by member States, and also because it suggests that if the Secretary-General, in the interests of the United Nations, took a decision that was in accord with representations made by a member State in connection with the secondment of a government official, this implies or constitutes an improper taking of instructions from that member State.

101. It has never been in dispute between the parties that the Respondent cannot seek or receive *instructions* from any government or from any other authority external to the Organization. However, as the head of a principal organ of the United Nations (see Art. 7, para. 1, and Art. 97 of the Charter) the Respondent is entitled to receive and consider representations from member States on matters of concern to the United Nations. Just as official representations by member States cannot be considered to constitute violations of Article 100, paragraph 2, of the Charter, their receipt and the conclusions drawn from

them by the Secretary-General do not violate paragraph 1 of that Article, which is designed to preclude *ad personam* pressures on members of the Secretariat.

102. Even in the case of appointments on secondment, the Respondent is free to decide whether such particular appointment is in the interests of the Organization. If he considers it to be so, the Respondent needs to obtain the consent of the government (or other permanent employer) because secondment is, of necessity, a tripartite affair (see the Appendix, sec. III). The obtaining of such consent or the failure to implement a secondment in the absence of such consent is, of course, not receipt of or compliance with an instruction (as Applicant asserts: doc. No. 1, para. 20).

103. It is submitted that the law on this point was succinctly described by the Administrative Tribunal of the International Labour Organisation in the case of *In re Rosescu* as follows:

> "The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the member State, which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forgo taking a decision in the organisation's interests for the sole purpose of satisfying a member State. The organisation has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them." (Judgment No. 431, para. 6; doc. No. 34.)

This point of view is shared by the Respondent and was submitted to the Administrative Tribunal in this case (Respondent's Answer to the Tribunal, paras. 21 to 26; doc. No. 21).

104. The Application to the Committee sought specifically to dispute the Tribunal's conclusion of fact that the Applicant did receive appropriate consideration for further employment by referring to the letter dated 21 December 1983 sent to the Applicant by the Assistant Secretary-General for Personnel Services (doc. No. 20, Annex 40) and to press reports and press statements submitted to the Tribunal concerning the motivation of the Respondent's decision not to re-appoint him (Application to Committee, para. 21; doc. No. 1, and doc. No. 22, Annexes 43 to 45, for the press statements).

105. However, the Tribunal's Judgement (doc. No. 9, pp. 54 to 55, paras. XVIII to XX) accepted the Respondent's submission to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). Such a finding of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter. The only issue for adjudication between the parties was whether the Applicant actually received every reasonable consideration for a career appointment.

106. The dissenting opinion found that the writer of the 21 December letter assumed that there was a legal impediment to any consideration of the Applicant for a career appointment and found, as a result, that such an assumption

would contravene the Charter. As was noted in Respondent's observations to the Committee (doc. No. 4):

> "15. . . . The Respondent submits that the dissenting member of the Tribunal misunderstood Respondent's position which was, and is, that 'the decision (now) contested was taken by the Secretary-General after consideration of all the circumstances in the case, including the Applicant's service record, together with the estimation of his supervisors and representations on his behalf by counsel, and the events of 10 February 1983 and thereafter, together with the representations to diverse effect by the permanent missions of two member States' and that 'additional consideration thereafter in the Appointment and Promotion Board was not required, and would, moreover, have been manifestly inappropriate in view of the established procedures under Staff Rule 104.11 *(f)* (i) with respect to proposed appointment' (para. 24 of the Respondent's answer to the Tribunal).
>
> 16. The Respondent further submits that, in considering all the circumstances in the case, the Secretary-General was not unduly influenced by the views of one or another Government, and certainly did not entertain the belief, as suggested by the dissenting member of the Tribunal, that the Applicant was precluded from consideration for re-appointment, but rather examined the case on all its merits before reaching an independent determination in the interest of the Organization."

107. The Statement of Mr. Ustor does not involve a question of law on the interpretation of the Charter since it does not state that the Respondent must obey instructions from a government but only takes the view that, if he decides that an immediate re-appointment, not on secondment, of a seconded official is desirable, the agreement of the government to that re-appointment must be obtained. Failure to do so, in the opinion of Mr. Ustor, would violate the terms of the contract of secondment or the intent of resolution 37/126; these views, however, do not involve a question of law on the interpretation of Article 100, paragraph 1, of the Charter.

(iii) *Article 101, Paragraph 3, of the United Nations Charter*

108. Article 101, paragraph 3, of the United Nations Charter provides as follows:

> "3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

109. The Application to the Committee argued that the Tribunal erred on a question of law relating to Article 101, paragraph 3, of the Charter because it did not find that the Respondent should have considered whether to offer the Applicant a new appointment principally on the basis of his high standards of efficiency, competence and integrity (Application to Committee, paras. 23 to 25; doc. No. 1).

110. This argument suggests that, under Article 101, paragraph 3, of the Charter, the Respondent should, in deciding whether to offer the Applicant a further appointment, in practice only take into consideration his personal qualities.

111. The Applicant's interpretation of Article 101, paragraph 3, is not sup-

ported by its text and is inconsistent with Article 97 of the Charter, which makes the Secretary-General the chief administrative officer of the Organization who is obviously required to take decisions in the overall interests of the Organization, as recognized by the Administrative Tribunal of the International Labour Organisation in *Rosescu* (Judgment No. 431, para. 6; doc. No. 34; quoted at para. 103 above).

112. Furthermore, Article 100, paragraph 1, gives—as recognized by this Court in 1954 (see para. 95 above)—the General Assembly power to direct and guide the Secretary-General in questions relating to staff appointments. According to the Assembly's directives—which do not seek to detract from Article 101, paragraph 3—other factors (for example, age, nationality, prior inconsistent employment[1]) may legitimately lead to a decision not to appoint a person in spite of his or her outstanding efficiency, competence and integrity.

113. The Applicant also contends that the Tribunal's Judgement errs because

> "clearly implicit in the Tribunal's decision is the notion that the Applicant's resignation from his Government's service is a disabling and prejudicial factor which must be given primacy over the qualities enumerated in Article 101.3" (Application to the Committee, para. 24; doc. No. 1).

This argument appears to refer to paragraph XII of the Tribunal's Judgement wherein Judgement No. 326 *(Fischman)* is referred to, which cited a 1953 Fifth Committee report to the General Assembly that:

> "International officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (Report of Fifth Committee, para. 70; doc. No. 14.)

114. This Report was concerned with the many difficulties that arise for the United Nations if a staff member on a G-IV visa in the United States (as was the case of the Applicant) takes steps to change his nationality by becoming a permanent resident in the United States, for example, waiver of the Organization's privileges and immunities and liability to United States taxes with consequent claims to reimbursement (doc. No. 14, paras. 61 to 72). Such a change with its inherent problems for the United Nations, as was stated in the 1954 Circular issued to staff by the Respondent "in no way represents an interest of the United Nations" (doc. No. 15, para. 12) and thus is obviously a matter that may be taken into account in connection with appointment decisions. In any event, the Tribunal, immediately after referring to these matters made it clear that they were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems (Judgement, p. 52, *supra*, para. XII; doc. No. 9) and the Respondent does not dispute this.

115. Consequently, the Judgement of the Tribunal does not involve an error on a question of law relating to Article 101, paragraph 3, of the Charter.

116. It may, however, be useful to refer briefly to the dissenting opinion, which cited Article 101, paragraph 3, and took the view that the Respondent could not, in the light of that provision, have become party to an arrangement

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[1] For example, Article 6 (2) of the Statute of the International Civil Service Commission provides that a member of the Commission shall not serve as an official or consultant of a member organization during his or her term of office or within three years of ceasing to be a member of the Commission. (There is a similar provision in the Statute of the Joint Inspection Unit.)

(i.e., the secondment agreement) with a member State that would preclude all future employment of an official who changed his nationality (Judgement, p. 57, *supra*, dissenting opinion, para. 8; doc. No. 9). The dissenting opinion, however, differs from the Tribunal's Judgement on a simple question of fact. The Respondent, in his own view, gave "every reasonable consideration" to offering the Applicant a career appointment. The Tribunal found that this had been done even though it criticized Respondent for failing to adequately record this in writing (Judgement, p. 55, *supra*, para. XX; doc. No. 9). The dissenting opinion found that such consideration had not been given (Judgement, p. 57, *supra*, dissenting opinion, paras. 7 and 8; doc. No. 9). Whether the Tribunal's Judgement or the dissenting opinion is correct is not a question of law relating to Article 101, paragraph 3, of the Charter.

(iv) *Article 8 of the United Nations Charter*

117. Article 8 of the Charter provides as follows:

> "The United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

118. The Application to the Committee argued that the Judgement violates Article 8 of the Charter because it placed a number of restrictions on appointment to the United Nations Secretariat (Application to Committee, paras. 26 to 28; doc. No. 1).

119. This argument appears to rest on a misconception as to the scope and meaning of Article 8 of the Charter, as well as on the mistaken assumption that the Tribunal had determined that there were any restrictions on the eligibility of the Applicant to be considered for a career appointment.

120. Actually the scope of Article 8 is entirely different from that suggested by the Applicant: it is solely concerned with discrimination on the basis of sex and directs that men and women shall be eligible to participate under conditions of equality in the principal and subsidiary organs of the United Nations (including the Secretariat). No issue in this case and no part of the Judgement in any way, explicitly or implicitly, refers to the capacity of men and women to serve in the United Nations Secretariat under conditions of equality.

121. The prohibition of "restrictions" in Article 8 of the Charter is plainly intended solely to preclude any form of gender-related discrimination, and not to prevent restrictions that may apply equitably to men and women[1]. Any other interpretation would drastically curtail the powers of the General Assembly to regulate recruitment pursuant to Article 101, paragraph 1, of the Charter.

122. In any event, the Tribunal did not find that there were restrictions on the eligibility of the Applicant to be considered for a career appointment. On the contrary, the Tribunal found that paragraph 5 of section IV of resolution 37/126 applied to the Applicant but that the Secretary-General, in the light of all the circumstances, had properly decided not to grant him a career appointment (Tribunal's Judgement, paras. XIV-XVIII; doc. No. 9). Furthermore, the Tribunal's Judgement did not hold that the Applicant was ineligible to serve in the Secretariat, the decision simply upheld a discretionary decision by the Secretary-General not to offer him a career appointment at a particular time.

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[1] See Leland U. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations* (3rd ed., 1969), pp. 104-105; Hans Kelsen, *The Law of the United Nations* (1950), pp. 152-153.

(v) *Article 2, Paragraph 1, and Article 100, Paragraph 2, of the United Nations Charter*

123. Article 2, paragraph 1, of the Charter provides as follows: "1. The Organization is based on the principle of the sovereign equality of all its Members." Article 100, paragraph 2, provides as follows:

> "2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

124. The Application to the Committee argues that the fact that some Governments expect to be consulted prior to the appointment of their nationals to the Secretariat and require those nationals to accept only fixed-term appointments violates Article 2, paragraph 1, and Article 100, paragraph 2, of the Charter (Application to Committee, paras. 30-33; doc. No. 1).

125. This argument mistakenly assumes that the Tribunal's Judgement had condoned the granting of such special rights to particular member States to be consulted on the employment of their nationals.

126. It is difficult to see how the Tribunal's Judgement could have done this and how it could be viewed as involving a question of law in respect of either Article 2, paragraph 1, or Article 100, paragraph 2, of the Charter. The Judgement has nothing to do with these provisions but concerns the application of paragraph 5 of section IV of resolution 37/126, in particular, whether the Applicant received "every reasonable consideration" for a career appointment, which consideration the Tribunal found as a fact had been given to him.

127. The Application also alleges that the requirement of the Soviet Government that its nationals accept only fixed-term appointments violates Article 2, paragraph 1, of the Charter. However, the policies of any individual government in respect of the employment of its own nationals by the United Nations can hardly violate the principle of sovereign equality of all member States.

128. The Application also implies that the fact that a member State makes its views on appointments known to the Secretary-General violates Article 100, paragraph 2, of the Charter. This argument is without foundation since member States are entitled to make their views known to the Respondent who, as the head of a principal organ of the United Nations and without being bound by them, may consider those views when reaching his own independent decision in the interests of the Organization (see also paras. 99 to 107 above).

III. CONCLUSION

129. This Written Statement has submitted that the Tribunal exercised the jurisdiction vested in it by Article 2 of its Statute "to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members". The finding in the Tribunal's Judgement that the Respondent observed the Applicant's contract and terms of appointment was a full and proper exercise of the Tribunal's jurisdiction and did not require an explicit answer to abstract questions posed by the Applicant.

130. This Written Statement also submitted that, in holding that the Respondent complied with General Assembly resolution 37/126, the Tribunal did not deal with questions of law relating to provisions of the Charter and that, in fact,

the Tribunal's Judgement was in accord with all provisions of the Charter cited in the Application to the Committee.

131. It is submitted that the Secretary-General properly discharged his responsibilities as chief administrative officer of the Organization by deciding not to offer the Applicant another appointment upon the expiration of his last fixed-term contract on secondment, after considering all the relevant circumstances including representations made by the Applicant, his counsel, his supervisor and member States.

132. This Court is, therefore, respectfully requested to respond negatively to both of the questions submitted to it by the Committee.

(Signed) Carl-August FLEISCHHAUER,

The Legal Counsel
of the United Nations.

26 February 1985.

Appendix

OUTLINE OF ESSENTIAL CHARACTERISTICS OF CAREER APPOINTMENTS, FIXED-TERM APPOINTMENTS AND FIXED-TERM APPOINTMENTS ON SECONDMENT[1]

I. Career Appointment

1. A career appointment—which is the most prevalent appointment in the United Nations—is a permanent appointment which has no specific expiration date but is subject to review at the end of the first five years of service (Staff Rule 104.13 *(a)* (ii); doc. No. 18). At the present time, grant of a permanent appointment is limited to staff holding probationary appointments (Staff Rule 104.13 *(a)* (ii); doc. No. 18). However, paragraph 5 of section VI of General Assembly resolution 38/232 recommended to the Secretary-General

> "that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts" (doc. No. 13).

II. Fixed-Term Appointment

2. A fixed-term appointment is defined by Staff Rule 104.12 *(b)* as being an appointment "having an expiration date specified in the letter of appointment" which appointment "does not carry any expectancy of renewal or of conversion to any other type of appointment" (doc. No. 18). This means that the Staff Rules do not give the holder of a fixed-term appointment any right to further employment. However, the Tribunal has held that the circumstances surrounding such an appointment may create an expectancy for further appointment (Tribunal Judgements Nos. 142 *(Bhattacharrya)* and 205 *(El-Naggar)* (docs. Nos. 23 and 24)).

3. Section IV of General Assembly resolution 37/126 of 17 December 1982 modifies these principles by providing, in its paragraph 5, that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment" (doc. No. 12).

4. The Secretary-General is bound by and has complied with this resolution. However, this resolution does not entitle the staff to which it refers to a career appointment. The decision to grant a career appointment is solely within the discretion of the Secretary-General, which decision is to be made after having given "every reasonable consideration" to staff concerned.

III. Fixed-Term Appointment on Secondment

5. Staff Rule 104.12 *(b)* (doc. No. 18) provides as follows:

> "The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years

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[1] See also doc. No. 36, Annex VII.

to persons recruited for service of prescribed duration, *including persons temporarily seconded by national governments or institutions for service with the United Nations*. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." (Emphasis added.)

6. The term secondment is not defined in the Staff Rules but, in practice, means that a staff member has been given a fixed-term appointment with the consent of his permanent employer and on the understanding of all three parties to the arrangement that the service at the United Nations will be limited in duration and that the staff member has a right to return to his former employment at the end of his fixed-term appointment.

7. The duties of each of the three parties to the secondment arrangement are well established and have been conveniently summarized as follows by Tribunal Judgement No. 192, *Levcik* (doc. No. 28, paras. IV and V):

> "IV. The substantive law governing the secondment of a staff member of the United Nations to the Secretariat of the Inter-Governmental Maritime Consultative Organization has been applied by the Tribunal in the *Higgins* case (Judgement No. 92). In that case, after taking cognizance of the rules contained in various documents from the Consultative Committee on Administrative Questions concerning the transfer, secondment or loan of officials between organizations applying the common system of conditions of employment in the United Nations, the Tribunal, having held that those rules were not binding on the parties, had to seek some other legal basis for its decision. The basic principles set out by the Tribunal in Judgement No. 92 are generally applicable to secondment, and particularly to cases envisaged in Staff Rules 104.12 *(b)*.
>
> According to that judgement,
>
> > 'IV. There is no legal definition of the term "secondment" in the Staff Regulations and Rules of either IMCO or the United Nations. Nevertheless, the term "secondment" is well known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits . . .
> >
> > VI. . . . there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned . . .'
>
> V. The principles stated in Judgement No. 92 imply that in a case of secondment the situation of the official in question must be defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment. These documents must be brought to the knowledge of the official concerned and his consent must be obtained. Any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved. When a government which has seconded an official to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the government.
>
> Bearing in mind the provision in Article 100 of the Charter that 'in the performance of their duties the Secretary-General and the staff shall not

seek or receive instructions from any government or from any other authority external to the Organization', the Tribunal considers that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member."

STATEMENT ON BEHALF OF THE APPLICANT MR. VLADIMIR YAKIMETZ WITH RESPECT TO JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

May it please the Court:

1. to accept jurisdiction in this case under Article 65.1 of its Statute; and
2. to find and declare, based on the statement of facts and arguments set out hereunder and otherwise before the Court, that Tribunal Judgement No. 333 was flawed by fundamental errors of law and should be reversed; and
3. to render an advisory opinion for the guidance of the Secretary-General regarding the issues raised by the Applicant in the case.

The views of Mr. Vladimir Victorovitch Yakimetz, hereinafter referred to as the Applicant, are set forth in accordance with Article 11, paragraphs 1 and 2, of the Statute of the Tribunal, for transmission to the Court by the Secretary-General. This statement contains the following headings:

A. Request to the Court to accept jurisdiction — Paragraphs 1-5
B. Explanatory statement — Paragraphs 6-49
C. Legal arguments
Preliminary observations on the scope of review — Paragraphs 50-51
I. Did the United Nations Administrative Tribunal fail to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
(i) The standard to be applied — Paragraphs 53-57
(ii) The issues before the Tribunal — Paragraphs 58-62
(iii) Did the Tribunal "apply its mind" to the questions by the Applicant, and exercise its jurisdictional powers in its resolution? — Paragraphs 63-75
(iv) Conclusion — Paragraphs 76-78
II. Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?
(i) The scope of review — Paragraphs 79-82
(ii) The Charter provisions at issue — Paragraphs 83-85
(iii) In regard to the principle of merit — Paragraphs 86-99
(iv) In regard to the principle of neutrality — Paragraphs 100-109
(v) In regard to the principle of equality — Paragraphs 110-120
(vi) In regard to the administrative principles of the Charter — Paragraphs 121-131
(vii) In regard to Chapter XV — Paragraphs 132-149
(viii) Conclusion — Paragraph 150

A. Request to the Court to Accept Jurisdiction

1. In the two previous cases in which the Court has been called upon to consider a request for an advisory opinion under the procedure laid down in Article 11 of the Statute of the Administrative Tribunal (Judgements No. 158, *Fasla* and 273, *Mortished*) the Court has expressed misgivings about certain features of the review procedure. The Applicant shares those misgivings, particularly as to the inequality of parties, the absence of a record of the proceedings, and the denial to his counsel of the right to be present, even as an observer. The sole choice, however, lies between "judicial control of the kind exemplified by the present proceedings, and no judicial control at all" (President Lachs, *I.C.J. Reports 1973*, at p. 214). The Court concluded, in *Fasla*[1], that the Committee on Applications for Review of Administrative Tribunal Judgements was an "organ of the United Nations", duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96.2 of the Charter to request advisory opinions of the Court. The Court is therefore competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Tribunal's Statute.

2. Despite the permissive character of Article 65, the Court has consistently held that "a reply to a request for an opinion should not, in principle, be refused" (*I.C.J. Reports 1951*, at p. 19, *I.C.J. Reports 1973*, at p. 183).

> "In the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials." (Advisory Opinion, *I.C.J. Reports 1956*[2] at p. 86; also Advisory Opinion, *I.C.J. Reports 1971*[3], at p. 27; and Advisory Opinion, *I.C.J. Reports 1962*[4], at p. 155.)
>
> "The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation." (Advisory Opinion, *I.C.J. Reports 1982*[5], at p. 26.)

3. Recourse to the International Court of Justice was intended only for "exceptional cases". The case at bar is, by any reasonable definition, an "exceptional case". It is, moreover, singularly appropriate for examination by the highest judicial body of the United Nations. It presents, in the form of a concrete case or controversy, many issues that have long plagued the Organization. No other organ of the United Nations has the authority, the freedom or the will to provide clear legal guidance on these problems, although their effects on the functioning of the Secretariat have been the subject of considerable comment, both scholarly and popular. From time to time in the history of any organiza-

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[1] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*.

[2] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco.*

[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).*

[4] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter).*

[5] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal.*

tion it is necessary for appropriate authority to stand above politics and to reaffirm principles. The Administrative Tribunals of both the United Nations and International Labour Organisation stood almost alone in defence of basic legal principles in the 1950s. Their competence and decisions were upheld by the Court *(Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954, Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956.)* This case presents issues of principle no less fundamental, and which lie at the heart of the malaise affecting the United Nations today.

4. If allowed to stand, the Judgement of the Administrative Tribunal in this case effectively rewrites the Charter. It replaces the principle of merit with political influence as the paramount consideration for appointment and promotion of staff. It sanctions practices that are opposed to the values and the purposes articulated by the Preparatory Commission and the United Nations Conference on International Organization. It fails to uphold the concept of an independent career service as the "core" and backbone of the Secretariat. It widens the discretionary powers of the Secretary-General at the expense of both the staff and the General Assembly. It interjects considerations of nationality and loyalty that have no place in an organization devoted to internationalism. It glosses over the gap that exists between the legal code of conduct and the operational code, permits a double standard and ignores the obligations imposed by the oath of office and the Staff Regulations.

5. Therefore, since the Court has competence, since the request was properly framed in accordance with established procedures by the duly authorized organ, since the case is an "exceptional" one and the issues of utmost importance, the Applicant respectfully requests the Court to render an Advisory Opinion herein.

B. Explanatory Statement

6. The Applicant's early career in the USSR was in Physics. Between 1956 and 1966 he took an undergraduate degree and a Ph.D. at the Moscow Institute of Physics and Engineering, and did research and postgraduate work at the Institute of Nuclear Physics, Novosibirsk. From 1966 to 1969 he taught theoretical physics at the Moscow Institute of Physics and Engineering, and published a number of studies based on his research, some in international journals. Although employed by the Ministry of Education, his post, as senior teacher, was not a permanent or "tenured" one, but rather subject to election every two years. A teacher who fails to gain re-election has to look for another position.

7. In 1969 he applied, as an independent candidate, to the United Nations language recruitment service in Moscow. He passed the competitive examination, qualifying for a post in translation. He was cleared by his Government for foreign service, and proposed for a post as Translator Trainee at the Associate Officer (P-2) level. He signed a two-year release from the Ministry of Education. He was not asked to sign another and had no further dealings with the Ministry.

8. The Applicant's first United Nations P-11 (Personal History) form, dated 5 June 1969, was completed in Moscow and delivered, not to the United Nations, but to the USSR Ministry of Foreign Affairs who proposed his candidacy. Under Item 29, which asks "Are you now, or have you ever been, a permanent civil servant in your Government?" he answered "No". Under Item 28, which asks "Have you any objections to our making inquiries of your present employer?" he again answered "No" (doc. 20, Annex 1).

Neither the offer from the United Nations, nor his acceptance, mentioned the term secondment. His Letter of Appointment, for a five-year fixed-term contract, was signed in November 1969. Under Item 5, *Special Conditions*, it specified "None" (Annex 3).

9. On 10 December 1969, the Applicant took the oath to perform his duties and regulate his conduct exclusively in the interests of the Organization, and to neither solicit nor accept instructions from any government or any other authority external to the Organization.

10. In 1970 his entry-level was corrected to P-3. In 1972 he was promoted to P-4. In 1974, five weeks before the end of his five-year contract ended, he resigned from the United Nations in order to pursue further studies, in economics and international relations at the State Academy for Foreign Trade, Moscow. He graduated in June 1977. At the same time, as part of his studies, he underwent training—from November 1974 to June 1976—at the Moscow Institute of Mathematical Economics, and from September 1976 to June 1977 at the Institute of Systems Analysis.

11. On 19 June 1977 he submitted another P-11 form to the Ministry of Foreign Affairs, which transmitted it to the United Nations with a covering letter recommending his candidacy. Once again, in answer to the question "Are you now, or have you ever been, a permanent civil servant in your Government?" (Item 29) he answered "No" (Annex 6).

12. On 11 November 1977 the Appointment and Promotion Board approved his appointment as Russian Reviser at P-4 "on a fixed-term secondment basis for a period of five years". On 23 November 1977 the United Nations offered him a "five-year fixed-term appointment, on secondment from the USSR Government". On the same date the USSR Mission was informed that this offer had been made. The Applicant's Letter of Appointment, however, signed on 24 January 1978, did not mention secondment and once again, under Item 5, *Special Conditions*, specified "None" (Annex 10).

13. The Applicant's performance in the Language Service was very highly rated—two Performance Evaluation Reports described him as "one of the best translators and revisers in the Service". In 1980 his name was put forward by the USSR authorities for the Appointment and Promotion Committee and he served as Administration Candidate during 1981, 1982, and again in 1983, when he was elected Vice-Chairman.

14. During 1980 the USSR authorities recommended him for substantive posts outside the Language Service enclave. He was put forward unsuccessfully, for a post in Geneva. He was also put forward for a post in the Programme Planning and Co-ordination Office of the Department of International Economics and Social Affairs (PPCO/DIESA) where at the time there was only one national from a Socialist country amongst over 30 professional posts.

15. The Office plays a central role in the preparation of the medium-term plan, according to regulations mandated in General Assembly resolution 37/234. This plan is the principal policy directive of the United Nations, and sets out the objectives and strategies to be followed by the United Nations in the six-year period it covers. The programme budgets of the Organization must be formulated within the framework of the plan. The programme narratives in the budget set out the commitments the Organization undertakes in exchange for the resources appropriated by the General Assembly. Programme performance reports set out the actual performance of the Organization in relation to the commitments made in the budget.

The Office, therefore, requires not only special skills but also a high degree of continuity of service from its staff. Programme Officers must be familiar with the economic, social and technological issues of development in which the organization is involved through its many organs (special centres, regional commissions, UNEP, UNCTAD, UNIDO, etc.). They must monitor and interpret the intergovernmental debate during the review process. The medium-term plan covers six years. The programme budget cycle (including the formulation and the review periods) is close to four years. No matter how academically qualified, it takes at least two years for an officer to learn all phases of the relevant special procedures.

The Office must invest considerable time in training and therefore prefers candidates who would be available long enough to be useful. Nevertheless, the Assistant Secretary-General for Programme Planning and Co-ordination, Mr. Peter Hansen, agreed to try out the Applicant.

16. The trial period convinced the Office of the Applicant's capacity to meet their requirements. When a post became available in September 1981, the Department formally requested his transfer, even though he had, at the time, only a little more than one year to go on his contract. Mr. Hansen, who wished to increase the number of economists from Socialist countries on his staff, discussed his intentions with the Soviet Mission, to whom he expressed the hope and expectation that it would be possible to retain the Applicant for a long enough period to make effective use of his newly acquired training and experience. He received the impression that it could be worked out.

17. The Applicant's Performance Evaluation Report for the period remaining on his fixed-term contract was excellent. In September/October Mr. Hansen discussed a two-year contract extension with the Chief of Personnel Services in the USSR Mission and was told that for technical reasons it was easier to propose extensions for one year at a time. The Department therefore requested a year's extension—to 26 December 1983—on the understanding that further extensions would be granted.

On 22 October 1982 the United Nations requested the Permanent Mission of the USSR to help "in securing the consent of its Government in the extension of Mr. Yakimetz's secondment to the United Nations through 26 December 1983". The Permanent Mission responded on 15 November 1982. The letter communicates the Permanent Mission's "agreement to the extension of the contract of Mr. Vladimir Yakimetz . . ." with no reference to secondment (Annex 17).

In December 1982 he was recommended for promotion to P-5.

18. The Letter of Appointment as P-4 Programme Officer, DIESA, signed by the Applicant on 9 December 1982 says under 5, *Special Conditions*, "On secondment from the Government of the Union of Soviet Socialist Republics" (Annex 19).

19. While the new contract was being prepared, and the old contract was still in force, the Applicant was told by his Mission that although they had agreed to an extension, he must understand that it was only so that the post would be held for a Russian, and he would actually stay only until the middle of the year. He was told that he must secure Mr. Hansen's acceptance for a substitute they would propose.

In January 1983 he was told to take leave in Moscow in February to help prepare a substitute candidate—who had already been selected—for his post. The Applicant requested leave. Mr. Hansen refused, because of pressure of work.

20. In late January 1983 the Applicant learned from a Russian colleague that the USSR authorities had selected and were going to propose a replacement for him on the Appointment and Promotion Committee (a purely internal

Secretariat body). This increased his apprehension that he would not be permitted to return to his United Nations post if he were to obey his Government's order to go to Moscow.

21. Mr. Hansen, who at the time knew nothing of the dilemma in which the Applicant had been placed, wrote him a memorandum on 8 February 1983, as follows:

> "Our discussions on your leave schedule for the next few months have prompted me to inform you of my intention to request an extension of your contract after your current contract expires on 26 December 1983. As you know it would be only at the end of 1983 that you would have received full training in all aspects of the biennial programme planning cycle so that, as I had indicated to you last year, I believe that it would be in the interests of the Office to have your services continued.
>
> I would appreciate it if you could let me know at your earliest convenience whether you would be in a position to accept such an extension." (Annex 21.)

22. On 9 February the Applicant applied for asylum in the United States. On 10 February he submitted to the Ambassador and Permanent Representative of the USSR to the United Nations his resignation from the Ministry of Foreign Affairs and from all other official positions in the Soviet Government (Annex 22). He also wrote to the Secretary-General of the United Nations informing him, pursuant to Staff Rule 104.4 *(c)* of his intention to acquire permanent residence status in the United States of America. He added:

> "For personal reasons, including my obligations to the United Nations as expressed in Staff Regulations 1.3 and 1.9, I have made an application to the Government of the United States requesting asylum.
>
> I have resigned from all official positions I hold in the Government of the Soviet Union and a copy of my resignation, delivered today to the Soviet Mission to the United Nations, is enclosed.
>
> I wish to insure *(sic)* you of my continued dedication and devotion to the United Nations and my wish and intention to continue to perform all my obligations under my employment contract." (Annex 23.)

23. On February 10 he also requested a few days annual leave. This was granted. The Applicant reported back to work on 22 February 1983. On 23 February he was told by his supervisor that a member State had objected to his presence in the Headquarters cafeteria and the 2nd-floor coffee shop.

24. On 28 February Mr. Sadry, the Director, Division of Personnel Administration, Office of Personnel Services, delivered to the Applicant a memorandum, as follows:

> "I have been requested to communicate to you the decision of the Secretary-General to place you on special leave with full pay, effective 1 March 1983 and until further notice. This action is taken in accordance with the provisions of Staff Rule 105.2 *(a)*, which reads as follows:
>
> > *(a)* Special leave, with full or partial pay or without pay, may be granted for advanced study or research in the interest of the United Nations, in cases of extended illness or for other important reasons for such period as the Secretary-General may prescribe.
>
> Any other decision pertaining to your case will be taken by the Secretary-General at a later stage." (Annex 26.)

25. On 1 March the Applicant, in a letter to the Director, Division of Personnel Administration, pointed out the difficulties such special leave would cause for his workload. He wrote, *inter alia*:

> ". . . Perhaps I might have a better understanding of the significance of the Secretary-General's memorandum if I could have written answers to the following points:
>
> 1. I should appreciate being advised of the precise reasons as to why the leave has been granted. I do not consider the mere statement of the language of Rule 105.2 *(a)*, 'for other important reasons', satisfactory to advise me as to why this action has been taken.
>
> 2. What would be the effect of the proposed leave on the following:
>
> *(a)* my free use of any and all United Nations facilities without having to seek permission in each instance;
>
> *(b)* my continuation as a member of the Appointment and Promotion Committee and as Vice-Chairman of the Third Working Group;
>
> *(c)* the promotion which is in process for me;
>
> *(d)* my career development at the United Nations including a possible extension of my present appointment.
>
> I shall look forward to receiving written answers to my questions at your convenience. In the meantime, I shall remain actively at my post." (Annex 27.)

26. On 3 March the Director of the Branch in which the Applicant worked wrote to Assistant Secretary-General Hansen:

> "Mr. Yakimetz indicated that he had not requested any leave.
>
> The Office is currently engaged, with all available resources being tapped, in the process of budget formulation. Mr. Yakimetz is in charge of a few Budget Sections in the Economic and Social Sector, and has been working very actively on them.
>
> His unavailability for an undetermined period is a major inconvenience for the work of the Office. Reassigning his tasks to other programme officer will delay the whole process, and probably make it impossible to respect the deadlines for the budget submission to CPC.
>
> Mr. Yakimetz has indicated to me his willingness to continue to work, unless his current status would prevent him from so doing. Your guidance will be very much appreciated." (Annex 28.)

27. On the same date the Director, Division of Personnel Administration, responded to the Applicant's letter of 1 March. He wrote, *inter alia*:

> "2. As to your request to be advised of the reasons for the decision in question, I wish to point out that in the exercise of his authority and responsibility as the Chief Administrative Officer of the Organization, the Secretary-General has determined that, at this juncture and pending further review, it is in the best interest of the Organization that you do not enter the premises of the United Nations. I would ask you therefore to comply with this decision of the Secretary-General with immediate effect and until further notice. You will be advised in due course of any modification to this instruction.
>
> 3. The above also replies, I believe, to the questions you raised in paragraph 2 *(a)* and *(b)* of your letter. Concerning the recommendation which was made for your promotion, I am sure that the Appointment and

> Promotion Board will give it due consideration at an appropriate time in the course of its proceedings. Finally, as regards your question as to the possible extension of your appointment, I would wish to point out that consideration of this matter at this time would be premature. You may also wish to refer to Staff Rule 104.12 *(b)* which is applicable to this issue." (Annex 29.)

28. On 17 March the Applicant requested a review under Staff Rule 111.3 *(a)* of the decision to place him on special leave. His letter concluded:

> "I again request a written explanation as to why it is considered 'in the best interest of the Organization' that I 'do not enter the premises of the United Nations' but, on the advice of my counsel and under protest, I will of course comply with your decision." (Annex 30.)

29. The Applicant *de facto* continued his assigned work on the programme budget in offices in New York City where United Nations departments were temporarily quartered during construction of the new Headquarters complex. In due course, when the new DC-2 Building was opened, he was permitted to rejoin his section and serve out his contract. His promotion to P-5, retroactive to 1 April 1983, was implemented. The ban on entering the main Secretariat building, however, was never withdrawn.

30. Throughout this period his American attorney, Mr. Orville Schell, had been discussing the Applicant's future with the Executive Assistant to the Secretary-General, who suggested that further United Nations employment would pose fewer problems if the Applicant could obtain United States citizenship. The Applicant had been granted temporary residence status, with permanent residence assured in one year. In order to comply with the Executive Assistant's advice, Mr. Schell decided to forego the application for permanent residence, and seek citizenship instead. A private bill in Applicant's behalf, to waive the five-year statutory residence period, was introduced in the United States House and Senate in October 1983.

31. On 25 October 1983 the Applicant addressed a memorandum to Assistant Secretary-General Hansen on the subject of his future.

> "My fixed-term contract with the United Nations is due to expire on 26 December 1983.
>
> As you will recall we have had several discussions on the prospects of my continuing employment in the Office for Programme and Co-ordination. I would like to state once again that I have always considered it to be a special privilege to serve the United Nations. It is my sincere belief that during the eleven years that I have been serving the Organization I have always tried to perform my duties to my fullest, however limited, abilities. I also believe that the intense training in all aspects of programme planning and budgeting in the United Nations that I received over the past two years while working in the Office for Programme Planning and Co-ordination has substantially increased my potential usefulness to the Organization.
>
> In view of the above, let me express my hope that you will find it possible on the basis of my performance to recommend a further extension of my contract with the United Nations, or even better a career appointment." (Annex 32.)

32. A Performance Evaluation Report, which Applicant signed on 7 November 1983, rated his overall performance "Excellent". The report emphasized that he had

> "now worked on all aspects of the programme planning cycle and has acquired the technical knowledge and skills needed to supervise junior professionals in this work. It is rare for someone to learn these technicalities as rapidly and thoroughly as he has done."

Under Item 15, the staff member's attitude to the United Nations, the Chief, Programme Planning Section, wrote:

> "He is strongly committed to the principles of the United Nations Charter and in particular to an independent international civil service." (Annex 32.)

33. On 8 November Mr. Hansen wrote:

> "In your memorandum of 25 October 1983 to me you remind that your current contract with the United Nations expires on 26 December 1983.
>
> In this connection I have recently signed your performance report which shows that the excellent work you performed during the first year with the Office for Programme Planning and Co-ordination has been continued to the full satisfaction of your immediate supervisors. I am glad to note that you have fully met our expectation of continued professionalism, dedication to your task and hard work, which was the basis for your promotion. I consider you a staff member whose contribution over the past two years to the work of this Office, and undoubtedly also to the Offices in which you have served before, meets the high demands of competence and commitment which are to be expected from a United Nations official.
>
> From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time." (Annex 34.)

34. On 16 November 1983 the Applicant's American attorney, Mr. Orville Schell, wrote to the Executive Assistant to the Secretary-General to say that despite all efforts the private bill to waive the statutory waiting period for United States citizenship might not pass before Congress adjourned (Annex 35.)

35. On 23 November 1983 the Deputy Chief, Staff Service, Office of Personnel Services, wrote to the Applicant:

> "Upon instruction by the Office of the Secretary-General, I wish to inform you that it is not the intention of the Organization to extend your fixed-term appointment beyond its expiration date, i.e., 26 December 1983." (Annex 37.)

36. On 29 November 1983 the Applicant wrote to the Assistant Secretary-General, Office of Personnel Services, Mr. Nègre, requesting a three-month extension so that he could resort to the internal recourse procedures.

37. On 2 December the Assistant Secretary-General for Programme Planning and Co-ordination wrote to Mr. Nègre, saying:

> "I find it extraordinary that such a decision should be taken without consulting the head of the Office concerned, especially in the case of an officer with eleven years of excellent service to the Organization, who has received a personal evaluation report with the highest rating only four weeks ago, was promoted to the P-5 level and was elected Vice-Chairman of the Appointments and Promotion Committee earlier this year and is currently in the midst of important assignments for one of which he is in some ways uniquely well qualified and which are regarded as of considerable importance by member States. Bearing all these factors in mind I had assured

Mr. Yakimetz, shortly after signing his latest performance evaluation report, that I intended to recommend a further extension of his contract.

Apart from such matters of principle I wish to place on record the fact that this decision if allowed to stand would create severe problems for my Office over the next few months. Since, as you know, Mr. Yakimetz is barred from entering the Secretariat building the three other professional officers in the Programme Planning Section have had to assume Mr. Yakimetz's responsibilities for several sections of the 1984-1985 programme budget during the Assembly period. Mr. Yakimetz was therefore assigned full and sole responsibility for two important reports that must be completed in the next three months for the April 1984 meeting of CPC and has been working on them for the past several months. To reassign these reports at this stage would mean significant delays in their issuance and a loss in their quality.

It is in the best interest of the Office to continue to have the services of Mr. Yakimetz. Considering Mr. Yakimetz's long and outstanding record within the United Nations, I strongly recommend that his appointment be extended." (Annex 38.)

38. On 13 December the Applicant requested a review under Staff Rule 111.2 of the administration decision not to extend his contract. The letter stated:

> ". . . General Assembly resolution 37/126, IV, paragraph 5, states that 'staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'. Staff regulation 4.4 requires that . . . 'the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations'. Staff Rule 104.14 *(a)* (ii) says that 'subject to the criteria of Article 101, paragraph 3, of the Charter, and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat . . .' Article 101 (3) of the Charter and staff regulation 4.2 give as the 'Paramount consideration' . . . 'the necessity for securing the highest standards of efficiency, competence and integrity'.
>
> My Department has made it clear to me that in their view I have met those standards. My performance was rated 'excellent' in my most recent Performance Evaluation Report. I was recently promoted to P-5. I was given to understand on many occasions, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position. The most recent assurance was a memorandum to me dated 8 November 1983 from the Assistant Secretary-General for Programme Planning and Co-ordination, who wrote:
>
> > 'From my perspective as head of this Office, I find no difficulty in recommending a further extension of your contract and intend to do so at an appropriate time.'
>
> I understand that such a recommendation has been made. I have at all times tried to govern my conduct in accordance with the letter and the spirit of the Staff Rules and the terms and conditions of my contract with the United Nations. My Performance Evaluation Report indicates that I enjoy harmonious relationships with my colleagues. I was elected Vice-Chairman of the Appointment and Promotion Committee earlier this year, a position of some trust.

> Given this service record and these assurances, and after six years of continuous service, most staff members would have an expectancy that their candidacy for a career appointment would be given 'every reasonable consideration', as General Assembly resolution 37/126 IV requires. The contested administrative decision appears to preclude such reasonable consideration. The interests of good administration cannot be served by the interruption of the work with which I have been entrusted by my Department. I can think of no impediment to the forwarding of my name to the Appointment and Promotion Board except factors extraneous to my performance. The quoted General Assembly resolution places no restrictions as to eligibility, nor do staff regulations 4.2 and 4.4 nor Staff Rule 104.14 *(a)* (ii). Extraneous factors may not be used as a consideration in promotion, extension, transfer or in any of the areas where the paramount consideration must be the necessity of securing the highest standards of efficiency, competence or integrity. Extraneous factors may not be used to deny a candidate for a post fair and reasonable consideration, a position upheld in Tribunal Judgement No. 310 *(Estabial).*
>
> To deny me the right to reasonable consideration for a career appointment for any reason unrelated to merit, efficiency, competence, integrity—would, I believe, be a violation of Article 100 of the Charter.
>
> Therefore, I respectfully request that the Administrative decision be withdrawn and my name forwarded to the appropriate Appointment and Promotion body for reasonable consideration." (Annex 39.)

39. The reply of the Secretary-General, dated 21 December 1983, was signed by Mr. Nègre. It rejected the request for an extension and declined to reconsider the challenged decision. The pertinent paragraphs state:

> "Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.
>
> Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in Staff Rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.
>
> In view of the foregoing, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the decision communicated to you by letter of 23 November 1983. That decision is maintained and, therefore, the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment.
>
> Should you wish to pursue your appeal, the Secretary-General is prepared to agree to the direct submission of your case to the Administrative Tribunal." (Annex 40.)

40. On 26 December 1983, the Applicant's contract expired and he left the service of the United Nations.

41. On 3 January 1984, Mr. Yakimetz filed an Application with the United Nations Administrative Tribunal. In his Pleas he requested the Tribunal:

> "A. To consider his case at the Spring 1984 session of the Tribunal.
>
> B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> D. To adjudge and declare that he had an expectancy of further employment.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.
>
> F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment
>
> G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.
>
> H. To order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings."

At the conclusion of the Argument he asked the Tribunal to find (p. 28):

— that no legally valid secondment took place; and
— that the "Special Conditions" in his contract signed on 9 December 1983 were amended by agreement between the parties on or after 10 February 1983; resulting in a new contractual arrangement; and
— that after his contract expired on 26 December 1983 no legal impediment existed to the continuation of his United Nations appointment; and
— that he had an expectancy of continued United Nations service; and
— that his right to reasonable consideration for a career appointment was illegally denied; and
— that the Applicant suffered damage as a result of this denial;

and therefore:

— to find that the contested administrative decision was illegal; and
— to order that the Applicant's candidacy for a United Nations post be given reasonable consideration; and
— to award damages to the Applicant in the amount of the salary he would have received had his services been continuous. (Document 19.)

42. On 4 January 1984, at the Daily Press Briefing, Mr. J. Sills, the spokesman for the Secretary-General, responded to reporters' questions, as follows:

> "Mr. Sills said in reply that the process of seconding people to the United Nations was not a violation of the Charter. It was done by a number of States, not just the Eastern European countries. As examples, he cited Jean Ripert, Director-General for Development and International Economic Co-operation, who was seconded from the French Government, and Yasushi Akashi, Under-Secretary-General for Public Information, who was seconded from the Japanese Government. He said the United States

had specific legislation permitting secondment of United States officials to international organizations. He added that as Representative of the Secretary-General on Cyprus, Javier Pérez de Cuéllar, had been seconded from the Peruvian Government to the United Nations.

In response to a question, Mr. Sills said Mr. Yakimetz's contract had expired at the end of 1983 and had not been renewed *because the Soviet Government had not renewed the secondment.* (Emphasis added.) If Mr. Yakimetz chose to apply for a position with the United Nations, he would be given every consideration along with other applicants for any position, including his old position." (Annex 43.)

43. The *New York Times* of the same day, 4 January 1984, carried an article on the non-renewal of Mr. Yakimetz's contract. In the article the Executive Assistant to the Secretary-General, Mr. Emilio de Olivares, is quoted as saying: "We didn't extend it because we can't." "To have the contract extended", Mr. Olivares said, "Soviet consent was essential. But, he said, 'The Soviets refused'." (Annex 44.)

44. Responding specifically to the above newspaper report, Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, wrote a letter to the *New York Times*, which was published on 25 January 1984. He, too, recited other eminent officials who had been seconded and United States legislation permitting secondment, and concluded:

> "The United Nations endeavours to obtain qualified staff from every one of its member States. Direct employment as well as loans from governments have been used, and continue to be used, as normal recruitment procedures. The main difference between the two is that a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR." (Annex 45.)

45. On 9 January 1984, Mr. Yakimetz forwarded a new P-11 Personal History Form to the Division of Recruitment, Office of Personnel Services, applying for a job at the United Nations. Under Item 4 (Nationality(ies) at birth), he wrote "USSR". Under Item 5 (Present nationality(ies)), he wrote "USA, pending". Under Item 16 (Have you taken up legal permanent residence status in any country other than that of your nationality? If answer is "yes", which country?), he wrote "Yes. USA". Under Item 17 (Have you taken any legal steps towards changing your present nationality? If answer is "yes", explain fully:), he wrote "I have applied for US citizenship. The bill No. S.1989 is now before U.S. Senate."

Although his old position remained unencumbered, he received no acknowledgement of his application.

46. On 14 March 1984, the Respondent filed his Answer with the Tribunal. The Applicant filed written observations on 13 April 1984, attaching the statements of Mr. Sills, Mr. de Olivares and Mr. Ruedas, quoted *supra*, which had been made after his Application was filed. The Judgement of the Tribunal, against which the present appeal is directed, was dated 8 June 1984. The majority Judgement found that his pleas could not be sustained but expressed "dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution". The concurring statement denied that he was eligible for

such consideration. The dissenting opinion found that he was illegally denied his right to reasonable consideration for a career appointment.

47. On 20 July 1984, Mr. Yakimetz made an application to the Committee on Applications for Review of Administrative Tribunal Judgements. He argued that:

> "I. The Tribunal exceeded its jurisdiction and competence.
> II. The Tribunal failed to exercise jurisdiction vested in it.
> III. The Tribunal Judgement erred on questions of law relating to several provisions of the Charter.
> IV. The Tribunal committed fundamental errors of procedure which resulted in a miscarriage of justice. (Doc. 1.)"

The comments of the Secretary-General on the Applicant's Written Statement were circulated on 10 August 1984 (doc. 4).

48. On 20 August 1984, the United Nations Staff Union issued a statement in respect of the case (Annex A hereto). It said:

> "The Staff Union has followed very closely the case brought by a former staff member, Vladimir Yakimetz, challenging the decision of the Secretary-General not to consider a further extension of his contract as well as the possibility of a career appointment following the expiration of his previous contract which was based upon secondment from his national government.
>
> The Staff Union feels that this case has substantial implications for the independence and integrity of the international civil service. It views with alarm the failure of the United Nations administration to defend the rights of this individual staff member and the apparent political influence which has interfered with the proper adjudication of this case.
>
> The staff are further alarmed by the implications that support of this decision would have for the career international service. It apparently ignores the General Assembly's statement in resolution 35/210 'that no post should be considered the exclusive preserve of any member State or group of States . . .' and the clear principle of the independence of the Secretariat outlined in Article 100 of the Charter.
>
> In accepting his appointment, the Secretary-General stated on 15 December 1981:
>
> > 'I am to head a Secretariat which must preserve its basic sense as an authentic international civil service so as genuinely to serve the interests of the international community. In accordance with the Charter, this necessarily entails strict independence with respect to the national interests of the States which are part of the Organization.'
>
> He further stated, in an address to the staff on 12 January 1982:
>
> > 'As part of my effort to maintain the independent status of the Secretariat, I shall see to it that the career service of the staff will not be adversely affected by any considerations unrelated to merits. Specifically, I wish to reassure the staff that in matters related to career development, nationality as such will not be considered as a relevant factor. As much as any organization, and perhaps more than most, the United Nations needs to reward merit and put a premium on good performance.'
>
> The staff member's qualifications and merit have never been disputed. The sole question relates to his status and in particular to his nationality.

In the view of the staff, should any government be permitted to raise objections to continued employment on the basis of internal political considerations, the entire concept of an independent international civil service is thrown into jeopardy.

Apart from the question of his nationality, there was no impediment for his being considered for further employment. Article 101, paragraph 3, of the Charter is explicit in stating that the 'paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.'

The contested decision would clearly thwart the purpose of the General Assembly's resolution 37/126 which decided 'that staff members on fixed term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'. In this instance, a legal expectancy of continued employment was created, an expectancy which has been explicitly recognized in prior tribunal decisions.

If this principle is to be upheld, it cannot be made subject to exceptions based upon purely political considerations.

Given the implications that such a precedent will have, we feel it incumbent upon all concerned to assure that the final decision rests upon a valid and impartial legal determination. For this reason we support the applicant's request to the General Assembly's Committee on Applications for Review of Administrative Tribunal Decisions with a view to requesting an advisory opinion from the International Court of Justice."

49. The Committee deliberated during four closed sessions starting on 20 August 1984. Counsel for the Applicant made a written request to be present, as an observer; which was denied. On 28 August 1984, an open meeting was held at which the Chairman announced the decision, and at which several members made statements for the record. The Committee decided that there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the Application for review of Judgement No. 333; and requested an advisory opinion of the International Court of Justice on the following questions:

> "(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?" (Doc. 6.)

C. The Legal Issues

Preliminary Observations on the Scope of Review

50. The narrowness of the grounds on which a judgement of the Tribunal may be challenged under Article 11 reflects the considerable difficulties experienced by the General Assembly, in three years of vigorous debate from 1953 to 1955, in finding a satisfactory solution to the question of judicial review of

Tribunal decisions. Conscious of these difficulties, the Court has concluded that the function of the Committee on Applications for Review of Administrative Tribunal Judgements is "merely to make a summary examination of any objections to judgements of the Tribunal" to determine whether there was "a substantial basis for the application" (*I.C.J. Reports 1973*, p. 176). Its affirmative decision,

> "based only on a prima facie appreciation of the objections, is merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion." (*I.C.J. Reports 1973*, p. 177.)
>
> "The Court may interpret the terms of the request and determine the scope of the questions set out in it. The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion." (*I.C.J. Reports 1973*, at p. 184.)

A negative vote on any of the grounds should not be interpreted as a directive to the Court to exclude any of the issues of the case from its deliberations:

> "It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions: the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (Advisory Opinion, *I.C.J. Reports 1962*[1], at pp. 156-157.)

51. The Tribunal's judgements are *res judicata* as to the parties and binding on the General Assembly. They affect not only the rights of the particular staff member who is the Applicant, but all other present and future staff members similarly situated. They affect the attitudes and practices of the Administration of the Secretariat, and sometimes—as in this case—its relationship with member States. They affect the subsequent jurisprudence of the Tribunal itself and that of the other international administrative tribunals. They can have a profound effect on the morale and therefore the efficiency of the staff. It is therefore of the utmost importance that the judgements of the Tribunal be able to withstand the most rigorous judicial scrutiny for consistency with the letter and spirit of the Charter, and with general principles of law and fundamental fairness, both substantive and procedural.

52. The Applicant therefore respectfully requests the Court to interpret the scope of its advisory review so as to give weight to these broader considerations.

I. Did the United Nations Administrative Tribunal Fail to Exercise the Jurisdiction Vested in It by not Responding to the Question whether a Legal Impediment Existed to the Further Employment in the United Nations of the Applicant after the Expiry of His Contract, 26 December 1983?

(i) *The standard to be applied*

53. The Court in the *Fasla* case shed light on the kind of defects that could be considered fatal and the juridical tests to be applied:

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[1] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter).*

> "In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case. Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers the Court must have regard to the substance of the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue." (*I.C.J. Reports 1973*, at p. 190.)
>
> ". . . the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusion therefrom as to the obligations violated by the respondent . . ." (*I.C.J. Reports 1973*, at p. 193.)

54. Judges Forster and Nagendra Singh endorsed and amplified this view:

> "'Failure to exercise jurisdiction' would certainly cover situations where the Tribunal has either deliberately but erroneously omitted to consider a material issue in the case or has inadvertently forgotten to do so.
>
> The Tribunal may also be said to have failed to exercise jurisdiction if it has palpably and manifestly caused injustice, since such an exercise of jurisdiction would tend to amount to a failure of that exercise. This interpretation would be applicable only if the exercise of jurisdiction was so blatantly faulty as to render it invalid." (*I.C.J. Reports 1973*, at p. 218.)

There is

> "nothing to prevent the Court from analysing the conclusions reached by the lower Tribunal to determine whether or not the basic interests of justice are served in so far as there is adequate, proportionate or balanced relationship between the findings of the Tribunal and the conclusions reached in its Judgement" (*I.C.J. Reports 1973*, at p. 218).

55. Justice Dillard, in his separate opinion, cautions against too strict and narrow an interpretation of the provision, since it "was presumably inserted for the benefit of applicants rather than the reverse" (*I.C.J. Reports 1973*, at p. 236). The Court must determine not only whether the Tribunal has "applied its mind" but also whether it "omitted a particular material issue" or treated it "in such a perfunctory manner as to constitute an omission" (*I.C.J. Reports 1973*, at p. 240).

56. The Court also recalled (*I.C.J. Reports 1973*, at p. 207) its previously stated principle, that it is the duty of an international tribunal

> "not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions (*I.C.J. Reports 1950*, p. 402)".

57. One of the standards that might be applied to test for a jurisdictional failure would be the standard set by the Tribunal itself. As an "independent and truly judicial body" the Tribunal has established a history of healthy and at times courageous scepticism. Its strength, in the past, has been its refusal to accept without examination the statements, reasoning, practices or conclusions of any other entity. Implicit in its judicial character is that it must pronounce independently on the legal issues submitted to it: independently of the Secretary-General, independently of the General Assembly, independently of

member States, independently, in 1954, of the Commission of Jurists. A lapse from its own standards or from its own previously established jurisprudence could be considered as a failure to exercise the jurisdiction vested in it.

(ii) *The issues before the Tribunal*

58. The Applicant did not ask the Tribunal to order his reinstatement. He did not ask the Tribunal to determine his "suitability as an international civil servant". He did not ask the Tribunal to substitute its Judgement for that of the substantive department, the Appointment and Promotion Board, or the Secretary-General. He asked the Tribunal to make a legal determination as to whether an impediment existed to his further United Nations service after his contract expired on 26 December 1983. Did his contractual status impose a legal impediment to further service? Or did a legal impediment inhere in the nature of the Secretary-General's duties and obligations towards the Applicant or towards member States? Such a determination was a necessary preliminary to deciding whether the terms and conditions of his contract had been violated, and whether remedy was due.

59. The terms and conditions of his contract included mandates of the General Assembly. Under resolution 37/126, paragraph IV.5 (which was not yet part of the Staff Rules but which the Tribunal accepted as being binding on the Respondent) he was entitled, after five years of continuous good service, to reasonable consideration for a career appointment. Staff regulation 4.4 (also part of the terms and conditions of his contract) requires that

> "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations".

Staff Rule 104.14 *(a)* (ii) says that

> "subject to the criteria of Article 101 (3) of the Charter, and to the provisions of staff regulations 4.2 and 4.4, the Appointment and Promotion Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat . . .".

Article 101 (3) of the Charter and staff regulation 4.2 give as the "paramount consideration . . . the necessity for securing the highest standards of efficiency, competence and integrity".

60. The Applicant's excellence was undisputed. He occupied a permanent post, one that, by its nature, required a long-term commitment. His substantive department had requested his continuation in service. Under such circumstances any other staff member with the requisite five years on fixed-term contracts would have, not only the right of reasonable consideration for a career appointment, but also an expectancy that such consideration would be favourable. Yet he was notified on 23 November 1983 that his fixed-term appointment would not be extended. In response to his request for a review of that decision, Mr. Nègre, the Assistant Secretary-General for Personnel Services, wrote:

> "Your situation, . . ., is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expec-

tancy of renewal without the involvement of all the parties originally concerned.

Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in Staff Rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion of any other type of appointment'."

61. In the mind of Mr. Nègre, therefore, there were at least three legal impediments to his consideration for further service. In the mind of Mr. Nègre he was ineligible for "every reasonable consideration" without an expectancy of renewal. He was also ineligible "without the involvement of all the parties originally concerned", and the Organization had a duty to limit the duration of his United Nations career no matter how valuable his services might be. Mr. Nègre's letter indicates that he believed a secondment contract bestows a right on a government to veto further employment under any other form of contract and thus taint the seconded employee in perpetuity.

In the weeks that followed, it became clear that other high officials shared this view (paras. 42 to 44, *supra*). On 4 January 1984, the spokesman for the Secretary-General, Mr. J. Sills, said at the Daily Press Briefing: "Mr. Yakimetz's contract had expired at the end of 1983 and had not been renewed because the Soviet Government had not renewed the secondment." Mr. Emilio de Olivares, Executive Assistant to the Secretary-General, in his 4 January 1984 interview with the *New York Times*, is quoted as saying, "We didn't extend because we can't". "To have the contract extended, Mr. Olivares said, Soviet consent was essential. But, he said, 'The Soviets refused'." Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, in his letter to the *New York Times*, published on 25 January 1984, wrote:

> ". . . a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR".

62. Despite the unequivocal and public statements by senior officials that the impediment in the way of further employment for the Applicant was the requirement of USSR Government agreement and the refusal of that agreement ("The Soviets refused") the Secretary-General, in his legal persona as the Respondent before the Tribunal, denied that this was the case. In paragraph 21 of the Respondent's Answer before the Tribunal, he said that the explanation of Mr. Nègre (quoted in para. 66, *supra*) was merely a paraphrase of the principles set out in Judgement No. 92, *Higgins*. He went on to state:

> "Applicant appears to allege that consent of government was regarded by the Secretary-General as the *sine qua non* in this case and that lack of consent of government was the reason why Applicant's case was not put forward for consideration by the Appointment and Promotion Board: Respondent denies this allegation." (Doc. 21.)

In paragraph 22 of his Answer, he states:

> ". . . Applicant's resignation and request for asylum . . . obviated any necessity to consult any government for consent, since further appointment on the basis of secondment was obviously out of the question".

The Respondent, therefore, in his submission to the Tribunal, effectively admitted that the reasons given by Mr. Nègre in his rejection of the Applicant's request for review, as well as the reasons given publicly by senior officials and agents of the Secretary-General, were based on a mistake of law, since no further secondment was contemplated by any of the three parties involved.

(iii) *Did the Tribunal "apply its mind" to the questions put by the Applicant, and exercise its jurisdictional powers in its resolution?*

63. In order to resolve the questions before it, it was necessary for the Tribunal to make a determination of the Applicant's rights and contractual status; of the effects on that status of his resignation from his government on 10 February 1983; and of his rights and status at the end of his one-year contract on 26 December 1983.

It was also necessary to determine the nature of the Secretary-General's obligation towards the Applicant; under General Assembly resolution 37/126, IV, paragraph 5, and whether he fulfilled that obligation.

A. Concerning the Applicant's contractual status

(a) The Applicant's Arguments

64. The Applicant contended that he was never in any legally cognizable sense on secondment. All of his United Nations P-11 Personal History forms, forwarded and endorsed by the USSR authorities, stated that he was not, nor had ever been, a "permanent civil servant in [his] government's employ". His first two Letters of Appointment, in 1969 and in 1977, for five years each, made no mention of secondment and contained no "Special Conditions". There is no indication from the documents available, that the USSR authorities used the term "secondment". They merely presented his candidacy, in 1977, and in November 1982 agreed "to the extension of the contract of Mr. Vladimir Yakimetz". Since the five-year contract immediately preceding this extension carried no mention of secondment, the extension introduced a new term. The Applicant signed the contract because at the time he had no alternative. The mentions of secondment appear to emanate unilaterally from the United Nations, as though the Administration assumed that all candidates from Eastern European countries were permanent civil servants.

65. Even if a legally cognizable secondment took place, the Applicant contended that it ended with his resignation from the USSR Government on 10 February 1983. His contract of employment, being between himself and the United Nations, remained in force, and the only effect of his resignation was to relieve his Government of any obligation it might have had to keep a post for him, and to relieve the Secretary-General of any obligation he might have had to inform, consult or secure the consent of the USSR authorities in any future dispensation concerning him.

He argued that his one-year contract signed on 9 December 1982 was modified by agreement between the parties on or after 10 February 1983. On that date he notified the Respondent of a change in his status inconsistent with the *Special Conditions*. The Respondent, by forbidding his entry to United Nations premises, introduced his own amendment. Thus modified by both sides, the Applicant continued to work, and the Respondent to assign him duties and pay him, under the basic contract of employment.

66. If any obligation to consult his Government survived the Applicant's resignation from that Government, the Applicant argued that no such obligation could have survived the contract itself.

He contended that even if the Respondent had bound himself to seek the consent of the USSR authorities for an extension of secondment, no legal constraint existed after the expiry of his contract since there could be no question of another secondment. His status after 26 December 1983 was therefore just like any other fixed-term employee with an excellent service record, with the same right to reasonable consideration for further employment.

(b) The Previous Jurisprudence of the Tribunal

67. The jurisprudence on which the Applicant relied in advancing these arguments was the Tribunal's own. In Judgement No. 92 *(Higgins)* the Tribunal distinguished three kinds of staff migrations: "transfer", "loan" and "secondment". "Transfer" is "the movement of a staff member from one organization to another, with the agreement of both organizations and the staff member concerned, on the understanding that the releasing organization will be under no obligation to accept his return to it." "Loan" is "the assignment of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization." Under a "secondment" a staff member is "subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization". The receiving and releasing organizations cannot vary the terms of the secondment without the consent of the staff member concerned.

68. The *Higgins* case, however, concerned an interagency secondment, in which both the releasing and the receiving organization applied basically the same rules and were guided by common principles. The relationship of an employee to a national government is different in fundamental ways from the relationship between an international civil servant and an international organization. Therefore, because of Article 100 of the Charter and Staff Regulations 1.1, 1.2, 1.3 and 1.9 a secondment from a government must be more strictly construed than an interagency secondment. The Tribunal made clear, in Judgement No. 192 *(Levcik)*, the strictness of the standards to be applied where a government is involved. It conducted careful scrutiny of the correspondence and memoranda to satisfy itself that the requirements of secondment had been met. It distinguished between a standard formula used by the Office of Personnel services and an expression of legal intent. It demanded that the consent of the staff members be real rather than nominal. Judgement No. 192, in paragraph V, held that:

> ". . . in the absence of a secondment agreed to by all parties concerned . . . the Respondent cannot legally invoke a decision of a government to justify its own action with regard to a staff member".

The ILO Tribunal, in Judgment No. 431, *In re Rosescu*, applied the same strict standards, and found that to "defer to the will of the Romanian authorities", where an employment relationship between the complainant and his Government had ceased to exist, was a misuse of authority.

(c) The Tribunal's Analysis in Judgement No. 333

69. The Judgement concludes, in paragraph III, that "all three parties (the Respondent, the Government of the USSR and the Applicant) considered the Applicant's appointments of 28 December 1977 and 8 December 1982 as being

on secondment from the Government of the USSR". What the parties "considered" is a subjective standard, capable of much elasticity[1], and not one of the "requirements" articulated in *Higgins* or *Levcik*. The Applicant had answered "No" on two Personal History forms, eight years apart, forwarded and endorsed by the USSR Ministry of Foreign Affairs, to the question "Are you now, or have your ever been, a permanent civil servant of your Government?" The Judgement notes that he had once been a teacher at the Moscow Physical Engineering Institute—a non-tenured position relinquished some eight years before the signing of the contract in question. The Judgement also notes his letter of resignation from the Ministry of Foreign Affairs. The relationships of *all* Russian staff members with international organizations are handled by the Ministry of Foreign Affairs, no matter who their previous employers had been.

70. The departure from its own previous jurisprudence is more striking in the Tribunal majority's examination of the Applicant's status after his resignation on 10 February 1983. Whereas the Tribunal in *Higgins* and *Levcik*, and the ILO Tribunal in *Rosescu*, had held the consent of the staff member to be an essential requirement of secondment, the Judgement concluded, in paragraph XIII, that the status of secondment persisted after the Applicant had withdrawn his consent by resignation. Under the *Higgins* definition a seconded staff member is "subject to the staff regulations and rules of the receiving organization", retaining only a right of re-employment in the releasing organization. However, in this case, the Tribunal majority implies that a seconded staff member is denied certain rights, and the Respondent relieved of certain obligations specified by those regulations and rules. In particular, in paragraph XII the Judgement concedes that but for secondment the Applicant "could, in the jurisprudence of the Tribunal, have . . . expectation of one kind or another for an extension . . .". Paragraph XVIII implies that a "background of secondment" excludes a staff member from existing procedures of appointment and disables him from receiving a probationary appointment. Paragraph XI, which notes that his request for leave to return to Moscow to train a successor "was refused by the United Nations", and the conclusion that "he must necessarily face the consequences of his actions", imply that a secondment nullifies the staff member's oath of office and the Staff Regulations requiring him to act in the interests of the United Nations and not to receive instructions from any external authority. The concurring statement's prohibition of any further appointment "without the consent of the government concerned" implies that a secondment relieved the Respondent of his obligation to recruit staff on the principle of merit, and erased his duty not to seek instructions from any external authority.

71. Only the dissenting opinion examined the status of the Applicant after his contract expired on 26 December 1983, and concluded that since there was no possibility and no desire, either on the part of the USSR Government or on the part of the Applicant, that he rejoin the service of that Government, there was no impediment implied by the nature of secondment to prevent his further employment.

> "The only effect, therefore, of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations; how-

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[1] Thus for example, Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, in his letter to the *New York Times* (para. 44, *supra*) apparently "considered" that secondment was synonymous with "loan".

ever valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement . . ." (Para. 10.)

B. Concerning the obligation of the Secretary-General towards the Applicant under General Assembly resolution 37/126, IV, paragraph 5

(a) The Applicant's Arguments

72. The Applicant argued that, having rendered six continuous years of service highly rated by his supervisors, he came under the terms of General Assembly resolution 37/126, IV, paragraph 5, and had a right to "every reasonable consideration" for a career appointment. Since his substantive department had several times indicated its entire satisfaction with his services and intention to propose his continued employment, he had a reasonable expectation that such consideration, unless precluded by some legal impediment, would be favourable. He argued, in his *Observations upon the Answer of the Respondent*, that the General Assembly did not make consideration for a career appointment conditional upon expectancy of renewal. Indeed the resolution had made obsolete the Tribunal's previous jurisprudence on expectancy, except for periods of four years or less under fixed-term contracts.

(b) The Previous Jurisprudence of the Tribunal

73. In determining what constituted full and fair consideration, the Tribunals have always demanded procedural rectitude. Thus, for example, in Judgement No. 158 *(Fasla)* the Tribunal found that the circulation of an incomplete fact-sheet "seriously affected [Mr. Fasla's] candidacy for a further extension of his contract". In Judgement No. 310 *(Estabial)* the Tribunal held that the Charter and the staff rules demanded that consideration be real rather than nominal. In that case the Administration went through the motions of considering Mr. Estabial. The Tribunal found those motions unpersuasive, and held that due to an error of law the Respondent had in fact failed to give full and fair consideration to his candidacy.

(c) The Tribunal's Analysis in Judgement No. 333

74. The concurring statement denies that the Applicant was eligible for consideration for a career appointment. The majority Judgement, despite its conclusion that consent of his Government was a requisite for further employment and hence that without that consent, any consideration would be pointless, nevertheless finds that he was entitled to consideration, and got it.

75. The opinion finds evidence that reasonable consideration was in fact given in Mr. Nègre's letter of 21 December 1983 which states that the Respondent had "given careful consideration to the issues raised in your request for administrative review". The issues in question were raised by the Applicant in his letter of 13 December, nearly three weeks after the Deputy Chief, Staff Services, had written to the Applicant:

> "Upon instructions by the Office of the Secretary-General, I wish to inform you that it is not the intention of the Organization to extend your fixed-term appointment beyond its expiration date, i.e., 26 December 1983."

The Judgement holds, in paragraph XVIII, that "the Respondent had the sole authority to decide what constituted 'reasonable consideration'"—a departure from the Tribunal's insistence, in previous Judgements, on procedural rectitude based on full and complete information. In paragraph XX the Tribunal expresses

> "dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution",

thus implying that it would have been satisfied, in this case, with standards far less exacting than those laid down in Judgement No. 310, *Estabial*. The dissenting opinion finds that he was illegally denied consideration.

(iv) *Conclusion*

76. The Applicant respectfully submits that the Tribunal failed to "apply its mind" to the determination of his rights and contractual status, and the Secretary-General's obligations towards him. The Judgement held that he was on secondment from the Government of the USSR after his resignation from that Government, although the only role of the releasing organization, according to the *Higgins* analysis, is to preserve a right of re-employment. The Judgement, in paragraph IV, endorsed Mr. Nègre's view that "since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible under the circumstances", although the Respondent had specifically withdrawn that statement in his submission to the Tribunal, since no further secondment was contemplated. And, having determined that "renewal was impossible", the Judgement then concluded that he was given "reasonable consideration for a career appointment" by the Secretary-General himself.

77. Whatever consideration was given to the request for review, consideration for a career appointment could not have been reasonable if the Respondent, under an error of law, believed that he was unable to offer a career appointment without the consent of the USSR Government. It could not have been reasonable if he understood that consideration was conditional on an expectancy of renewal. It could not have been reasonable if he believed he was obliged to limit the duration of the Applicant's service to one year. It can scarcely have been reasonable if the head of the substantive department concerned was taken entirely by surprise, and if, moreover according to his Assistant Secretary-General, "the decision if allowed to stand would create severe problems for [the Programme Planning and Co-ordination] Office over the next few months" (para. 37, *supra*). And if the Secretary-General found himself under pressure "to diverse effect by the permanent missions of two member States", any decision he took may not have been in the untrammelled exercise of his discretionary powers.

78. Wherefore the Applicant respectfully prays the Court to find that the conclusions reached by the Tribunal as to his status and rights after his contract expired on 26 December 1983 were internally contradictory and inconsistent with the Staff Rules; and that its conclusions as to the nature of the Respondent's fulfilment of those obligations were not supported by the evidence before it. Further, the Tribunal did not abstain from deciding points not indicated in the submissions before it, such as the Applicant's "suitability" (see paras. 88 to 98, *infra*). And, in so far as it concluded that "no discernable injury" was

caused by the Respondent's omissions, the Applicant respectfully requests the Court to find that the basic interests of justice were not served; and that Judgement No. 333 should be set aside under this ground of challenge.

II. Did the United Nations Administrative Tribunal, in the Same Judgement No. 333, Err on Questions of Law relating to Provisions of the Charter of the United Nations

(i) *The scope of review*

79. No previous application for review of a Tribunal Judgement has raised so squarely a question of Charter interpretation, and therefore the Court has not had the opportunity to lay out the parameters of this ground of challenge. The Court has since 1948 strongly affirmed its competence to exercise an interpretive function in regard to the constituent treaty of the United Nations as "within the normal exercise of its judicial functions", and as part of its role "in the renewal and development of international law" *(Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), I.C.J. Reports 1948).*

> ". . . It is very much the business of this Court to judge whether there is a contradiction between a particular interpretation or application of Staff Regulations and Rules by the Tribunal and any of the provisions of the Charter" (*I.C.J. Reports 1982*, at p. 359).

80. In its jurisprudence the Court has repeatedly invoked the spirit, as well as the letter of the Charter. Thus, for example, the majority in the first of the *Membership* cases:

> "Moreover, the *spirit* as well as the terms of the paragraph preclude the idea that considerations extraneous to those principles and obligations can prevent the admission of a State which complies with them . . ." (*I.C.J. Reports 1948*, at p. 63.) (Emphasis added.)

Judge Lauterpacht, in *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*:

> "There is only limited merit in a judicial interpretation intent upon extracting every ounce of rigidity from a written constitution or in simplifying the issue by concentrating exclusively on extreme solutions. Thus, while unanimity, absolute or qualified, may be entirely alien to the *spirit* of the Charter and as such inconsistent with it, this does not apply to alternative solutions falling short of unanimity." (*I.C.J. Reports 1955*, at p. 113.) (Emphasis added.)

And, most eloquently, Judge Alvarez throughout his dissenting opinion in the *Anglo-Iranian Oil Co.* case *(Jurisdiction)*, e.g.:

> "Then it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts; those who drafted them did not do so with a grammar and a dictionary in front of them; very often, they used vague or inadequate expressions. The important point, therefore, is to have regard to the *spirit* of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life." (*I.C.J. Reports 1952*, at p. 126.) (Emphasis added.)

81. In the two advisory opinions rendered since Article 11 of the Tribunal's Statute was adopted, the Court has made clear that this ground of challenge considerably widens the scope of review to include matters of substance.

> ". . . in an appropriate case, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may . . . be called upon to review the actual substance of the decision" (*I.C.J. Reports 1973*, at p. 188).

In the *Mortished* case, the majority opinion found that

> "the Court clearly could not decide whether a judgement . . . has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide . . . to that extent the Court has therefore to examine the Tribunal's decision on the merits . . ." (*I.C.J. Reports 1982*, at p. 358).

In his dissenting opinion, Judge Lachs agreed as to the scope of review:

> "The requirement of 'connecting up' with the Charter, which is necessary for the Court to be able to examine the possibility of legal error, is thus a broad one, relating to the subject-matter of the Tribunal's deliberations, not necessarily to its actual analysis of Charter provisions." (*I.C.J. Reports 1982*, at p. 417.)

He added that the "business of this Court to interpret" implies a duty to reach a "conclusion as to what an alternative interpretation or application might have been. Any other approach would be self-defeating . . ." and that "the Court has the choice either of refusing the procedure or, if it accepts it, of trying to make it work" (*ibid.*, at p. 416).

82. The Applicant respectfully submits that Tribunal Judgement No. 333 violates the letter of a number of Charter provisions, and is inconsistent with the spirit of the Charter as a whole; and prays that the Court render an advisory opinion as to what an alternative application might have been.

(ii) *The Charter provisions at issue*

83. The Applicant, in his request for review of the administrative decision not to offer him further employment, raised explicitly two Charter principles: the principle of merit (Art. 101.3 reflected in Staff Regulations 4.2 and 4.4), and the principle of neutrality (Art. 100, which involves also Art. 2.3, and which is reflected in most of the Regulations in Art. 1 of the Staff Rules). In asking to be treated like "most staff members" he raised implicitly the principle of non-discrimination or equality (Preamble, Art. 1.2 and 1.3, Art. 8, and Staff Regulation 4.3). In seeking compliance with General Assembly resolution 37/126.IV, paragraph 5, he raised implicitly Articles 101.1 and 97, the administrative principles of the Charter, reflected in numerous Regulations and Rules. In seeking a career appointment, he raised the whole career concept which lies at the heart of Article XV of the Charter.

84. The Court, the General Assembly, and the Tribunal itself have all stated in the clearest possible terms that the Charter is one of the sources of law the Tribunal must apply. Thus, for example, the majority opinion in *Mortished* placed the Charter above all other legal norms: "It is true that the regulations and rules applied by the Administrative Tribunal must derive their validity from the provisions of the Charter" (*I.C.J. Reports 1982*, at p. 358). Judge Morozov, in dissent, wrote:

> "Instead of being guided by the resolutions of the General Assembly, and by its own Statute as adopted by the General Assembly, and by the provisions of the Charter, *which ultimately is the only source of law for the Tribunal* . . ." (Emphasis in the original.) (*I.C.J. Reports 1982*, at p. 444.)

The fact that the General Assembly, framing Article 11 of the Tribunal's Statute, regarded errors of law relating to the provisions of the Charter as ground for challenge to the International Court (but not errors of law relating to the Staff Regulations or its own resolutions), is evidence that the Assembly regarded the Charter as the dominant source.

85. The Applicant submits that a failure to reconcile its conclusions with principles of the Charter constitutes no less of an error of law than an erroneous interpretation of a Charter provision.

(iii) *In regard to the principle of merit*

86. In Judgement No. 333, only the dissenting opinion refers to the principle of merit, finding the majority's conclusions inconsistent with the Secretary-General's obligations under Article 101.3. The majority opinion makes no reference whatever to the Applicant's strong claim for consideration by virtue of his excellence, attested to in his performance reports under different supervisors in two tours of duty in the language service, and under the totally different demands of his substantive department, DIESA. Yet the Court, in 1954, found the safeguarding of the principle of merit to be one of the main *raisons d'être* of the Tribunal:

> ". . . the Court finds that the power to establish a Tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter." (*I.C.J. Reports 1954*, at p. 57.)

Similarly, in 1956, the Court interpreted the jurisdiction of the ILO Tribunal in complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations:

> "In so doing the Court has relied on the working of the texts in question as well as on their spirit, namely, the purpose for which they were adopted. That purpose was to ensure the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees . . ." (*I.C.J. Reports 1956*, at p. 98.)

87. The Tribunal had itself, only a year previous to Judgement No. 333, forcefully upheld the principle of merit against the demand—frequently asserted in the General Assembly—for more equitable geographical distribution. In Judgement No. 310, *Estabial*, the Tribunal found the Respondent to be acting under an error of law when he limited candidatures for a vacant post to nationals of French-speaking African States:

> "In so doing, he believed he was applying correctly the last sentence of Article 101, paragraph 3, of the United Nations Charter, which provides that:

> 'Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible',

a provision which is reiterated in Staff Regulation 4.2. The Tribunal attaches very great importance to these provisions. But while they allow the Secretary-General to invite candidatures in order to implement them he cannot refuse to consider the candidatures of United Nations staff members for a vacant post. This is so because the Charter itself (first sentence of Article 101, paragraph 3) provides that:

> 'The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity',

while Staff Regulation 4.2 (first sentence) provides that:

> 'The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity.'

It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' consideration the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount consideration set by the Charter in the interests of the service." (Judgement No. 310, *Estabial*, at para. XIV.)

88. The majority opinion in the case at bar, and more especially, the concurring statement, appears to raise as a new "paramount" consideration the Applicant's refusal to obey orders from his Government regarding his United Nations employment, and his consequent election "to break his ties with his country", which, they consider, disabled him from consideration for a career appointment. Resignation from government service, far from being a disabling factor, is a normal pre-requisite to seeking a career appointment. Since efficiency and competence are obviously not affected by a change of nationality or visa status, can it be that the majority regarded this election as reflecting on the Applicant's integrity?

89. Nothing in the Staff Rules precludes an election to change nationality. Staff members do so without incurring opprobrium. The Personnel Data Unit routinely compiles an "Annex to Nationality Statistics: Changes which have occurred in Staff in Posts Subject to Geographical Distribution", in which changes of nationality or visa status appear as "Gain" or "Loss" in the appropriate country quota. Some eight to ten changes are recorded each year. A change of nationality in no way disqualifies a candidate from consideration for a post; indeed the standard P-11 Personal History form contains a separate box for "Nationality(ies) at birth" and "Present Nationality(ies)", as well as boxes for "Have you taken up legal permanent residence status in any country other than that of your nationality?" and "Have you taken any legal steps towards changing your present nationality?" A candidate who answers "Yes" to the two latter questions is not rendered ineligible thereby. Staff Members who carry a passport other than that of their birth are not normally considered as lacking in integrity, and to the extent that they often bring linguistic abilities and multi-cultural understanding to their work, may be thought of as desirable employees in an international organization.

90. During their tenure, the measure of staff members' integrity must be their oath of office. When, during the 1950s, the Staff Rules were amended to allow

for termination when facts anterior to appointment, which would indicate lack of integrity, came to the notice of the Secretary-General, the Tribunals narrowly construed this provision. In the series of cases concerning non-renewals by Unesco of fixed-term contracts, the ILO Tribunal firmly rejected as self-evident any suggestion that integrity was synonymous with national loyalty:

> "Considering in relation hereto that it is necessary expressly to reject all uncertainty and confusion as to the meaning of the expression 'loyalty towards a State' which is entirely different from the idea of 'integrity' as embodied in the Staff Regulations and Rules; and that this is evident and requires no further proof;" (ILOAT Judgment No. 17, *In re Duberg*, p. 6.)

and:

> "That it does not therefore appear that the complainant placed his own interests above the true interest of the Organization, which interest consists above all in safeguarding *erga omnes* its own independence and impartiality." (*Ibid.*, p. 10.)

91. In the present case, the majority and the concurring opinion rely on language from Judgement No. 326 *(Fischman)*, which in turn relies on a 1956 Judgement, *Khavkine*, No. 66[1]. Both Khavkine and Fischman based their Tribunal appeals on the Universal Declaration of Human Rights, under whose provisions the United Nations, as an "organ of society" falls, and both raised questions about the Respondent's interpretation of the 1953 Fifth Committee proceedings, which are the source of the language quoted in Judgement No. 333.

92. Because of the decisive importance of *Fischman* in Judgement No. 333, it warrants closer examination. The 8th Session of the General Assembly, where the language quoted in Judgement No. 333, paragraph XII, and in *Fischman*, was used, was an extremely stormy session with a number of controversial issues on the agenda. The overwhelming bulk of the Fifth Committee's debate was concerned with Secretary-General Hammarskjöld's Report on Personnel Policy (A/2533) dealing with political activities by staff members; with the effects of the United States Executive Orders of 1953 establishing an International Organizations Employees Loyalty Board; with amendments to Staff Regulations 9.1 *(a)*, 1.4, 1.7, and 9.3 giving new grounds for termination; with revision of Article 9 of the Tribunal's Statute; and with the payment of indemnities to terminated staff ordered by the Tribunal. The United States Immigration and Nationality Act of 24 December 1952, requiring a written waiver of all rights, privileges, exemptions and immunities from an employee of an international organization on permanent residence status, was passed in the political climate of the period. Its effects on personnel policy were discussed at one meeting, the 419th, under great pressure of time.

93. The Report of the Advisory Committee, from which comes the phrase that "a decision to remain on permanent residence in no way represented an interest of the United Nations", dealt largely with tax reimbursement which at that date would have constituted a burden on the budget of the Organization[2]. There was also, at that time, concern over over-representation of the United

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[1] Both Fischman and, three decades ago, Khavkine, appealed to the Committee on Applications for Review of Administrative Tribunal Judgements, but because of the absence of either representation by counsel or records, only those present know on what grounds both applications were rejected.

[2] The introduction of the Tax Equalization Fund has since eased the burden.

States in the Secretariat. If the view, quoted in paragraph XII of the Judgement, was widely shared, it was shared in private and not reflected in the debate. The representative of Egypt said that:

> "International officials should be true representatives of the culture and personality of the country of which they were nationals and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations." (*GAOR*, 8th session, A/C.5/SR.419, at p. 274.)

He also spoke of geographical distribution and objected to tax reimbursement. The Indian representative "supported the remarks of the Egyptian delegate", but whether he referred to "culture and personality" or geographical distribution in general is not clear. All the other speakers were concerned about tax reimbursement, about the principle of equality among staff members and equity among member States in financial matters, and about the country quota to which permanent residents should be assigned. A Czechoslovak proposal that permanent residents be excluded from their country's quota and included in the United States quota was rejected. A Lebanese proposal that they be "considered as being in a special category" was adopted. Neither the Czechoslovak nor the Lebanese proposals were consistent with the view that those who opted for permanent residence "could no longer claim to fulfil the conditions governing employment in the United Nations". The will of the General Assembly, to the extent that it was reflected by the debate or the vote, simply does not sustain the proposition that the Tribunal, in paragraph XII, held "to provide an essential guidance in this matter".

94. An Information Circular, bearing hallmarks of hasty preparation, conveyed a summary of these deliberations to the staff. ST/AFS/SER.A/238, of 19 January 1954, entitled "*Visa Status of Non-United States Staff Members Serving in the United States*", records the language of the Egyptian delegate about culture and personality; but also the Special Category. Far from forbidding a change of visa status, the Circular said:

> "Requests for permission to sign the waiver of privileges and immunities in order to change from non-immigrant to permanent residence status will be considered individually, with attention given as to how such a change may ultimately affect the principle of geographic distribution[1]." (Doc. 15.)

No Administrative Instruction was issued at the time. The Staff Regulations and Rules continued to reflect—and still continue—the procedure for changing residence status, requiring, under Rule 104.4 *(c),* notification to the Secretary-General "before the change in residence status or in nationality becomes final".

95. On 16 August 1982, before the Tribunal considered the *Fischman* application, the 1954 Information Circular on Visa Status was superseded and cancelled by a new Administrative Instruction, ST/AI/294. The new instruction omitted mention of the Special Category[2]. It omitted entirely the view of the

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[1] Language service posts are specially excluded from geographical distribution. Fischman, unlike Khavkine, was in a language service post.

[2] The 1984 Report of the Secretary-General on the Composition of the Secretariat (A/39/453), however, continues to reflect, in Table 12, a Special Category, and mentions in paragraph 4 that:

> "Excluded from geographical distribution are: . . . staff who have permanent resident status in, but not the nationality of the country of their duty station . . ."

Egyptian representative quoted by the Tribunal (para. 93, *supra*). It also restored the original language from the Fifth Committee and ACABQ Report that was misquoted in several respects in the 1954 Information Circular. For example, the Fifth Committee had in 1954 endorsed the ACABQ view that a decision to "remain on" permanent residence status in no way represented an interest of the United Nations (clearly referring to the existing situation). The 1954 Circular had added "or acquire" permanent residence, giving prospective effect to the stricture. Both the quotations in Tribunal Judgement No. 333 are from the earlier, superseded, Circular.

96. The 1982 Administrative Instruction, in force at the time Mr. Yakimetz made his decision, provides in paragraph 20:

> "Exceptions to the policy that internationally recruited staff members must apply for G-4 visa status and give up their permanent resident or other visa status in the United States on appointment may be made in cases of: . . .
>
> *(b)* newly-appointed staff members who have applied for citizenship by naturalization, when such citizenship will be granted imminently; . . ."

The Respondent may well have had this provision in mind when he advised the Applicant, in March 1983, to seek naturalization. The only way to do this quickly was through the complex and arduous process of a private bill, in both Houses of Congress and their Judiciary Committees, to waive the statutory waiting period. This was the course on which the Applicant's United States Attorney, Mr. Orville Schell, embarked [1].

97. Paragraph 23 of the 1982 Administrative Instruction (ST/AI/294) gives the reason why staff are required to sign the waiver of privileges and immunities:

> "23. The signing of the waiver by staff members who are already in permanent resident status or acquired it after entry on duty places them in a position of parity with the staff of United States nationality with respect to their United Nations status . . ."

Thus the strictures about permanent residence status are placed in a context, not of exclusion from consideration, but of equal treatment of staff.

98. The 1982 Instruction specifically discarded the language about "culture and personality" and the statement that those who "elected to break ties . . . could no longer claim to fulfil the conditions governing employment in the United Nations". These views did not prevail in the Fifth Committee. They are inconsistent with Articles 15 (2) and 13 of the Universal Declaration of Human Rights and with the human rights provisions of the Charter, which refer to "people" rather than citizens or nationals, and speak of "the dignity and worth of the human person". They imply a cultural test for nationality, which comes dangerously close to a political criterion; which is unrealistic in the many countries which have multiple cultures and which would be impossible to administer in practice. And, they are manifestly inconsistent with Article 101.3 of the Charter, in which "the necessity of securing the highest standards of efficiency, competence and integrity" is couched in imperative terms, while recruitment on "as wide a geographic basis as possible" is in relative terms.

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[1] The Applicant was granted United States citizenship only on 16 January 1985.

99. Therefore the Applicant respectfully submits that the Judgement fails to take into account the principle of merit, and raises *sua sponte* obstacles inconsistent with that principle; obstacles whose legal foundation is tenuous and whose application, in this context, is arbitrary and prejudicial.

(iv) *In regard to the principle of neutrality*

100. Many of the delegations at the Preparatory Commission had before them a memorandum by C. Wilfred Jenks, based primarily on his ILO experience, which said:

> ". . . Experience has shown that the effectiveness of international secretariats depends largely on the extent to which they are genuinely international in character and consist of persons whose sole allegiance is to the international organization which they serve. There is a clear cut functional incompatibility between the international duties of the officials of such secretariats and the responsibility for upholding the national interests and policies of the countries of which they are nationals, and it is desirable that this incompatibility of function should be explicitly recognized by definite rules which are binding on officials and governments alike. A recognition of the importance of the matter born of a decade of experience led the Assembly of the League of Nations to require all League officials to make a solemn declaration that they would discharge their functions and regulate their conduct with the interests of the League alone in view, and would not seek, or receive instructions from any government or other authority external to the League. League experience showed these arrangements to be seriously defective in that under them the obligation of officials to exercise the functions entrusted to them with the interests of the League alone in view was not paralleled by any corresponding explicit obligation of the governments concerned not to seek to influence their nationals in the discharge of international duties. In the case of some of the organizations now being created the matter has been dealt with in a more satisfactory manner by including in their constituent instruments provisions on the subject which will be binding on officials and governments alike. Important as this principle is in the case of the specialized United Nations organizations for which it has already been adopted, it is still more vital in the case of the proposed general organization." (C. Wilfred Jenks, *Some Comments on the Dumbarton Oaks Proposals*, para. 19.)

101. Few Charter principles are as jealously guarded as the principle of neutrality. In the case of the Secretary-General and the staff, the obligations imposed by Article 100.1 are backed by their oaths of office and by Article 105. In the case of member States, Article 100.2 is reinforced by their undertaking under Article 2.2 to "fulfil in good faith the obligations assumed by them in accordance with the present Charter".

102. A large number of international instruments and agreements, as well as the Staff Regulations, afford specific protections to staff members in order to give substance to the principle of neutrality. Thus under section 18 *(a)* of Article V of the Convention on the Privileges and Immunities of the United Nations staff members have functional immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity". This immunity extends to official duties in the country of which they are nationals. Section 18 *(b)* exempts staff members from national taxation on the salaries and emoluments paid to them by the United Nations. This provision is

intended, at least in part, to insulate officials from national pressures which might be applied through their pockets. Staff members are exempt, under section 18 *(c)* of Article V of the Convention from national service obligations in their own or other countries, in the interest of freedom "from interference by national authorities and free(dom) to perform their duties". Staff members are enjoined, under Staff Regulation 1.6, from accepting any honour, decoration, favour, gift or remuneration from any government, and under Regulation 1.7 from engaging in any political activity, other than the right to vote, "which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants". Staff members travel, not on their national passports, but on a United Nations laissez-passer which makes no mention of the nationality of the holder.

103. Staff members may not rely, in matters relating to their employment, on the protection of their national laws (UNAT Judgement No. 67, *Harris*, ILOAT Judgment No. 28, *Waghorn*, *inter alia*) and the Secretary-General is not bound by action taken by national authorities (UNAT Judgements No. 62, *Julhiard* and No. 72, *Radspieler*; ILOAT Judgments No. 13, *McIntire*, No. 47, *Giuffrida*, No. 122, *Chadsey*, *inter alia*). The salaries and pensions of United Nations officials are immune from attachment by national courts (*United Nations Juridical Yearbook*, 1980, at p. 200, also UNAT Judgement No. 245, *Shamsee*, *inter alia*).

104. In accepting a United Nations position, a person loses many of the attributes as well as the protection of national citizenship and becomes an agent of the Organization.

> "In order that the agent may perform his duties satisfactorily he must feel that this protection is assured him by the Organization, and that he may count on it. To ensure the independence of an agent, and consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And, lastly, it is essential that—whether the agent belongs to a powerful or weak State; to one more affected or less affected by the complications of international life; to one in sympathy with or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is all the more necessary when the agent is stateless." (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, at pp. 183-184.)

105. "In the total absence of any tradition of impartiality", Akehurst points out,

> "legal rules have to take the full strain of protecting this principle. Moreover, an international civil servant is in a much more vulnerable position than his national colleague, and therefore requires more extensive legal protection."

The greater vulnerability comes from the absence of any means of recourse outside the international system: not to public opinion, not to an elected Parliament, not to municipal courts. Staff Associations remain relatively powerless.

The specialized nature of international work, and the interruption of professional contacts in home countries, make it hard to find another job.

> "If an official is not guaranteed sufficient protection by law, he will be tempted to try to enlist the support of his national government or of other member States—and this will have disastrous results on his impartiality, as well as exposing the whole Secretariat to the most undesirable pressures." (M. B. Akehurst, *The Law Governing Employment in International Organizations*, pp. 4-10.)

106. The risks to the principle of neutrality inherent in secondment were evident to the Preparatory Commission, which observed that

> "members of the staff [cannot] be expected fully to subordinate the special interest of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future" (UN Preparatory Commission: doc. PC 20, at 92).

The 11th Session of the General Assembly, faced with a demand for greater representation on the Secretariat from countries which preferred not to put forward their nationals for career appointments, raised the possibility of a conflict of loyalties. The Secretary-General reassured them that experience had shown that no serious problem of divided loyalties need arise, and, indeed, "the conditions of the Charter and the oath of office were safeguards in this" (*GAOR*, 11th Session Annexes, doc. A/3558, para. 126).

107. Secretary-General Hammarskjöld, in his 1961 Oxford address, said:

> "A risk of national pressure on the international official may also be introduced, in a somewhat more subtle way, by the terms and duration of his appointment. A national official, seconded by his government for a year or two with an international organization, is evidently in a different position psychologically—and one might say, politically—from the permanent international civil servant who does not contemplate a subsequent career with his national government." (Dag Hammarskjöld, *The International Civil Servant in Law and in Fact*, Clarendon Press, 1961, at p. 18.)

Hammarskjöld believed that a certain "critical mass" of secondments could threaten the functioning of the entire Organization.

> "To have so large a proportion [one-third] of the Secretariat staff in the seconded category would be likely to impose serious strains on its ability to function as a body dedicated exclusively to international responsibilities. Especially if there were any doubts as to the principles ruling their work in the minds of the governments on which their future might depend, this might result in a radical departure from the basic concepts of the Charter and the destruction of the international civil service as it has been developed in the League and up to now in the United Nations." (*Ibid.*, at p. 19.)

In addition to the effect on seconded officials themselves, there is a danger of infection, as Schermers has pointed out,

> "when the officials of some nationalities are dependent on their governments while others are not. Inequality damages the harmonious functioning of the Secretariat. In addition, the (sometimes erroneous) impression that some officials are dependent on their governments may encourage

> others to establish closer contacts with their governments in order to offset this presumed advantage[1]".

Secondments were sanctioned by the General Assembly to benefit the Organization—to provide special skills required for limited periods, to improve geographical representation—and only incidentally for the benefit of member States. They were never intended as a device for blacklisting former staff members or giving States a right to veto appointments. The necessity to construe strictly the limits of a government involvement arises not only from the interests of the Organization, not only from the legally protected rights of officials, but also from Article 100 of the Charter. An official who comes in with the consent of a government may not expect, nor may the Organization bestow, special treatment. Still less may the Tribunal suggest that special treatment would be proper.

108. Tribunal Judgement 333 failed to find impropriety in a staff member being barred from entering Headquarters in order to avoid offence to a member State. The Judgement finds no impropriety in a member State "contemplating replacing the Applicant by another person whom they had already selected", or "suggesting to him that he should leave for Moscow" soon after he had undertaken programme duties under a new contract, thus sanctioning a higher allegiance to his country than to the United Nations. The Judgement finds no inconsistency with Article 100—and indeed endorses—Mr. Nègre's statement that no further employment could be contemplated "without the involvement of all the parties originally concerned", although any further secondment was clearly out of the question. In the statements of Mr. de Olivares, Mr. Sills and Mr. Ruedas, the Judgement sees no illegal delegation of the power of appointment. "The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences of his actions", said the majority Judgement, failing to note that he was under an obligation to act for the duration of his contract in the interests of the United Nations and not in the interests of his Government, and that, in difficult circumstances, he upheld that obligation.

109. Therefore the Applicant respectfully submits that the Judgement fails to apply the principle of neutrality, and reaches conclusions inconsistent with the principle; denying to the Applicant the assurance, required by the Court, that he may count on the protection of the Organization in the independent performance of his duties.

(v) *In regard to the principle of equality*

110. The Charter, unlike the Covenant of the League, gives explicit expression to the principle of equality. The Preamble invokes the equal rights of men and women and of nations large and small. Articles 1.2 and 1.3 declare respect for the principle of equality to be one of the Purposes of the United Nations; second only to the prevention of war. Article 2.1 applies the principle of sovereign equality to all member States; Article 8 brings the principle to the internal governance of the Organization. Indirectly the Charter gives wider application to the concept. Article 13 (1) *(b)* empowers the General Assembly to initiate studies and make recommendations for "assisting in the realization of human rights". Article 55 *(c)* says the United Nations shall promote: "univer-

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[1] H. G. Schermers, *International Institutional Law*, Sijthoff, 1980, at p. 477. See also, H. Herzog, *Doppelte Loyalität*, Dunker & Humblot, 1975.

sal respect for an observance of . . . human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Articles 62 (2) and 68 charge the Economic and Social Council with responsibilities in the field of human rights. Article 76 *(c)* defines as one of the basic objectives of the trusteeship system "to encourage respect for human rights".

111. The Charter speaks for, and to, people as individuals rather than citizens or nationals. The Charter begins: "We, the peoples . . .", and refers to "men and women" and "the dignity and worth of the human person". Similarly, the Universal Declaration of Human Rights, the substantive articles of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and most other international instruments of general application, refer to the equal rights of "all people", "all nations", "all individuals", "all persons" and "all human beings". Article 101.3 speaks of recruiting staff, not by nationality, but "on as wide a geographical basis as possible".

112. If the United Nations is to promote equal rights,

> "it is obviously bound to proclaim and practice the same principles within its internal legal system: not only to avoid but to bar all types of discrimination among those serving this Organization" (*I.C.J. Reports 1982*, diss. op. Lachs, at p. 419).

It would be an error of law to give "a more privileged position to some and [to place] others on a disadvantageous level". It would be an error of law in terms of Article 8 if restrictions were placed on the eligibility of some to participate in any capacity and under conditions of equality in any organ of the United Nations. It would be an error of law in terms of Article 2.1 if any member State demanded, or received, special or differential treatment of its nationals. The principle of equality is implicit in, and closely intertwined with, the principles of merit and neutrality.

113. In a 1969 Legal Opinion, the Legal Counsel responded to a question from the General Counsel, International Bank for Reconstruction and Development, whether the Secretary-General could agree to a request by a member State that its nationals be appointed only on a temporary basis and with the prior approval of the governmental authorities:

> "The Secretary-General could not, in my opinion, agree to limit appointments of nationals of the member State concerned to fixed-term appointments and thus exclude them as a group from other types of appointments, including career appointments, provided for in the Staff Regulations and Rules. Nor would it be proper for him to condition appointment of such nationals on their Government's approval.
>
> This does not preclude consultations with the Government about appointments or the consideration of Government views. The United Nations has in the past for example recognized the need, particularly of developing countries, to retain within their country or their government services scarce technical and professional personnel; consideration of such interests when exercising appointment power is entirely consistent with the Charter. Similarly, the Secretary-General may take into account, when considering appointments, information from governments relating to suitability. Receipt of such information may assist him in securing the standards of efficiency, competence and integrity referred to in the Charter. We have, however, had occasion to reject requests that the Secretary-General undertake as an obligation to consult a government on appoint-

> ments, although governments receiving assistance are by some UNDP Agreements entitled to be consulted on technical assistance experts to be assigned to projects within the country." (*Juridical Yearbook*, 1969, at p. 228.)

114. United Nations practice appears to diverge markedly from the views expressed in this Opinion. The 1984 Report of the Secretary-General on the Composition of the Secretariat (*GAOR*, 39th Session, A/39/453) shows in Table 10 the percentage of staff on fixed-term appointments by country and by region. Only one region, Eastern Europe, has virtually all staff on fixed-term. (Of the Eastern European countries, 73.7 per cent of Yugoslav nationals are on fixed-term; 84.6 per cent of Bulgarian nationals, and the rest have 100 per cent on fixed-term, except for Albania with no nationals on the staff.) The People's Republic of China, also Socialist, does not restrict its nationals to fixed-term or secondment contracts. The only countries in other regions with 100 per cent of their nationals on fixed-term appointments have only one national on the staff.

115. Normally, according to General Assembly resolution 35/210, paragraph 1 (3), "no post should be considered the exclusive preserve of any member State or group of States", but paragraph 1 (4) permits "replacement by candidates of the same nationality . . . in respect of posts held by staff members on fixed-term contracts . . . to ensure that the representation of member States whose nationals serve primarily on fixed-term contracts is not adversely affected". This exception, according to the figures above, is for the benefit of the Eastern European countries only.

116. The Tribunal in Judgement No. 192, *Levcik*, recognized that "almost never is an application from an Eastern European received directly", but rather through the national missions of their governments[1]. The Russian language service is the only exception to the system of world-wide competitive language examinations, all candidates coming through a single institution in Moscow. The ILO Tribunal in Judgment No. 431, *In re Rosescu*, heard testimony about the requirement of certain Eastern European countries that their nationals turn over part of their emoluments to their governments[2]. (See also T. Meron, 167 *Recueil des cours* 289 (1980-XI); and A. Pellet, 106 *J. Droit international* 570 (1979).)

117. No State can evade its Charter obligations by claiming that different social realities entitle it to exceptional treatment. The ILO Committee of Experts on the Application of Conventions and Recommendations has consistently rejected arguments that a different approach to the application of labour conventions could be followed in the Socialist States. The Committee felt that its duty was

> "to examine . . . from a legal point of view, to what extent countries which have ratified Conventions give effect in their legislation and practice to the

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[1] The Representative of Czechoslovakia to the Committee on Applications for Review of Administrative Tribunal Judgements, in the public meeting of that Committee on 28 August 1984, distinguished between the Secretary-General's obligation under Article 100 (1) of the Charter, and "the legitimate right of any government to convey to the Secretary-General its views on matters relating to its interests . . . These matters naturally include questions related to the employment of nationals of member States whether or not a staff member or an applicant for employment has chosen to sever relations with his government." (A/AC.86/XXIV/P.V.5, at p. 14.)

[2] Certain other governments supplement the United Nations salaries of their nationals. The Staff Union is on record as opposing both practices.

> obligations which derive therefrom, irrespective of their political, social and economic systems. The Committee's observations are the conclusions drawn by it from a uniform application of this objective approach." (UN doc. E/1978/27, at 10.)

118. Judgement No. 333 notes, in paragraph XI, that

> "evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant. It was suggested to him that he should leave for Moscow early in 1983 for this purpose . . ."

The Tribunal makes no attempt to reconcile this with the principle of Article 2.1. The Judgement accepts without demur the special treatment implicit in this statement; the indication that some nationals might be exempt from normal recruitment procedures, or that some governments imposed conditions on their nationals that were inconsistent with their obligations under the Charter or under their contracts.

Moreover in paragraph VII the Judgement appears to assume that even the normal precondition of secondment—a permanent employment in the releasing entity—need not be strictly applied. And the concurring statement seems to dispense with the requirement of consent by the staff member, requiring only consent by the government.

119. Article 8 imposes in the plainest words an obligation to treat equally all staff members; to impose no restrictions on eligibility of all to participate in any capacity in any organ of the United Nations. Resolution 37.126 imposes no restrictions on eligibility, save continuity of service and merit. The Judgement does not challenge the extraordinary restriction placed on the Applicant's participation by his banishment from the Headquarters building so as to avoid offence to a member State. It implies that his impending change of nationality restricted his eligibility to participate. It imposes a requirement of government consent. It exempts him from the normal operation of resolution 37/126, by means of a supposed preclusive agreement whose only effect would be to deny him consideration from United Nations employment, no matter how valuable his services.

Other staff members, many others, have at one time or another resigned from the service of their governments. Others have changed nationality, or "broken ties", sometimes not by their own choice. The Tribunal not only endorses Mr. Nègre's view that the Applicant could not be treated "like most staff members", but also says that he could not be treated like most seconded staff members, who are permitted to resign and seek a career appointment.

120. Therefore, the Applicant respectfully submits that the Judgement fails to take into account the principle of equality, either of nations or of individuals; and sanctions a double standard under which certain nationals are deprived of rights which should be theirs under the Charter, and certain governments are endowed with privileges which should not be theirs under the Charter.

(vi) *In regard to the administrative principles of the Charter*

121. The Respondent, in his Answer before the Tribunal, conceded that "Applicant's resignation and request for asylum . . . obviated any necessity to consult any government for consent, since further appointment on the basis of secondment was obviously out of the question" (para. 22). He accepted that

"there was no contractual or otherwise legally based prohibition on the Secretary-General, either to grant or withhold another appointment" (para. 23). He accepted, indirectly, that the Applicant had a legal claim to "every reasonable consideration for a career appointment". The Respondent's argument ultimately rested on the discretionary powers of the Secretary-General, in the exercise of his authority and responsibility under the Charter. He claimed, in paragraph 25, that "the decision . . . was legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing issues" (doc. 21).

122. In his Comments on the Applicant's written statement before the Committee on Applications for Review of Administrative Tribunal Judgements the Respondent argued that

> "The Tribunal did not ignore General Assembly resolution 37/126 but in fact applied it and concluded that the Secretary-General properly exercised his discretion to consider the Applicant for a career appointment." (Para. 7.)
>
> "The Tribunal held that the Secretary-General had the sole authority to decide whether the Applicant *should* be granted a career appointment (emphasis added) and, after examining all the circumstances which the Secretary-General had taken into account, concluded that the Secretary-General properly exercised his discretion when he personally decided in the interest of the Organization not to offer the Applicant a further appointment." (Para. 12, doc. 4.)

123. What the Tribunal actually said was:

> "In the present case, the Respondent had sole authority to decide what constituted 'reasonable consideration' and whether the Applicant *could* be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant *could* not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given 'every reasonable consideration'." (Emphasis added.)

The concurring statement found no need even to exercise any discretionary powers, since the Applicant was exempt from the provisions of resolution 37/126 and "not eligible for consideration for a career appointment".

124. What the Judgement appears to be saying is that only in the case of a probationary appointment need a candidate be referred to the Appointment and Promotion machinery for consideration. For any other type of appointment the Secretary-General has sole authority to employ whatever method of consideration he chooses. In this case, he chose to give consideration himself, but "in the background of secondment" of his final one-year contract, decided he "*could* not be given a probationary appointment". Having decided earlier (para. XIII) that the background of secondment required the "consent of three parties" for any modification, the Tribunal is not clear what criteria the Secretary-General could have used for this consideration except to note, in paragraph XIX, that he took into account "representations to diverse effect by the permanent missions of two member States". Nowhere does the Judgement indicate that in its views the Secretary-General did in fact—as the Respondent claimed in his statements—give "consideration to all the circumstances in the case, including the Applicant's service record, together with the estimation of his supervisors . . .".

Indeed if he *could* not be given a probationary appointment, consideration of his service record and the estimation of his supervisors would be entirely pointless. The concurring statement is quite clear on this point.

125. The Secretary-General's powers of appointment are limited, under Article 101 (1) of the Charter, by the obligation to carry out the "regulations established by the General Assembly". The Court in *Mortished* held that the General Assembly has the power itself to make detailed regulations, leaving, sometimes, to the Secretary-General "a measure of discretion" in the actual drafting (*I.C.J. Reports 1982*, p. 359). Where the General Assembly lays down a principle it is left to the Secretary-General to give effect to it, first, by an administrative instruction, and eventually in a new version of the Staff Rules.

126. The General Assembly, having established in resolution 37/126, IV.5, a regulation in the clearest possible terms, the Secretary-General's discretion under this analysis extended to drafting an administrative instruction or rule to give effect to it, but not to carving out exceptions to it. He may retain a discretionary veto on who *should* be granted a probationary or career appointment, but not on who *could* be given every reasonable consideration, since the General Assembly had imposed no restrictions on eligibility.

127. Moreover, once the General Assembly has established a regulation, it becomes part of the terms and conditions of the Applicant's contract, even though not yet incorporated in the Staff Rules (UNAT Judgement No. 249, *Smith*). The discretionary powers of the Secretary-General do not extend to unilateral amendment of a staff member's conditions of service. Both the United Nations and the ILO Tribunals have in the past recognized these limits and set aside discretionary decisions if tainted by an error of law or based upon materially incorrect facts, or if essential material elements have been left out of account, or if obviously wrong conclusions have been drawn from the evidence. The Court, in *Fasla*, saw this as a fundamental part of the Tribunal's role:

> ". . . the jurisdiction developed by this judicial organ constitute(s) a system of judicial safeguards which protects officials of the United Nations against wrongful action of the administration, including such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of the staff member" (*I.C.J. Reports 1973*, at p. 205).

128. Discretionary power may be defined as "the situation in which the Administration is free to act or not to act, according to its own sense of policy; it is authorized, but not obliged to act, and has a free choice in the matter" (M. B. Akehurst, *The Law Governing Employment in International Organizations*, at p. 115; also S. A. de Smith, *Judicial Review of Administrative Action*, at p. 171; M. Waline, *Droit administratif*, at p. 449). Many municipal systems provide a remedy for

> "failure to exercise a discretion as a consequence of delegation of powers, acting under dictation, fettering a discretion by self-created rules of policy, bargaining away a discretion or misconstruing the scope of the discretion by reason of an error of law" (C. W. Jenks, *The Proper Law of International Organizations*, at p. 100).

Both English and French administrative law impose a duty to exercise a discretion (de Smith, *supra*, at p. 187, and Waline, *supra*, at pp. 489-490.) Akehurst describes the failure to exercise discretion as: "if the Administration is empowered to do A or B and does A because it believes it is not allowed to do B, . . ." (Akehurst, *supra*, at p. 131).

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129. All the available contemporary evidence—Mr. Nègre's letter, the statements of Mr. Sills, Mr. de Olivares and Mr. Ruedas—indicate, not a decision in the exercise of his discretionary powers that the Applicant *should* not be offered an appointment, but rather a failure to exercise discretionary powers in the sense described above: that he believed he was not allowed to do so without the consent of a government. The dissenting opinion in Judgement No. 333 examines a second self-imposed fetter on the Secretary-General's discretionary powers—that of a supposed agreement "to limit the duration of [the Applicant's] United Nations service". Vice-President Kean concludes that "it cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement".

130. The Secretary-General is described in Article 97 of the Charter as the "chief administrative officer of the Organization", a phrase not found in the Covenant. Read together with Articles 100 and 101 it creates for the Secretariat a position of full political and managerial independence. As chief administrative officer the Secretary-General is bound to act, at all times, in the interests of the Organization. Because the Charter envisages a continuing commitment to "succeeding generations", the chief administrative officer has an obligation to put the long-term interests of the Organization ahead of the short-term interests, where they conflict.

> "He may not forego taking a decision in the Organization's interests for the sole purpose of satisfying a member State. The Organization has an interest in being on good terms with all member States, but that is no valid ground for a Director-General to fall in with the wishes of every one of them." (ILOAT, No. 431, *In re Rosescu.*)

The long-term interests of the Organization are served by upholding the principles of the Charter and, where necessary, asserting them.

131. Wherefore the Applicant respectfully submits that the Judgement fails to draw a line between the proper limits to the Secretary-General's discretionary powers, under Article 97, and his obligations under Article 101 (1) of the Charter to carry out the regulations established by the General Assembly; permitting, under an error of law, an unlawful delegation of his power of appointment in violation of the Applicant's rights.

(vii) *In regard to Chapter XV*

132. Chapter XV of the Charter reflects the decision, taken at San Francisco, that the United Nations Secretariat should be an international and not an intergovernmental body. Each of the Articles in Chapter XV implies, and reinforces, all of the others. In his *Report to the President on the Results of the San Francisco Conference* 26 June 1945 the United States Secretary of State explained:

> "The intent of the proposals made at San Francisco was to make it perfectly clear that the nationals of member States serving as the staff of the Secretariat could not, in any sense of the word, be considered as agents of their governments. It was also deemed important to provide that member States accept an obligation to refrain from seeking to influence the Secretary-General or any member of the staff of the Secretariat. These provisions were considered essential to assure that the Secretary-General and the staff would constitute a truly *international* civil service . . . The proposed Secretariat will be, in effect, an *international* civil service. It will be

recruited on the basis of competence, promoted on the basis of merit, and selected with the due reference to linguistic and geographical consideration." (Dept. of State, *Publication No. 2349*, at p. 150.) (Emphasis added.)

133. The concept of a career service is central to the notion of an independent, competent, politically neutral international civil service responsible only to the Secretary-General, who in turn is responsible to the General Assembly, both subject to the Charter. The Preparatory Commission made explicit this connection. In order to "serve the advantages of experience" and establish "sound administrative traditions", the bulk of the staff should be career officials. This was both in the interests of quality—without assurance of career prospects "many of the best candidates will inevitably be kept away"—and neutrality, since "members of the staff [cannot] be expected fully to subordinate the special interest of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future" (*Report of the Preparatory Commission of the United Nations* (1945), PC/20 at 92).

134. Proposals by Yugoslavia that the staff be "selected from nationals belonging to Members of the United Nations", and that "the appointment of officials of the Secretariat should be made with the consent of the member government of which the candidate is a national", were rejected. A large majority of delegations argued that the latter proposal would impinge on the exclusive responsibilities of the Secretary-General under Article 101, would threaten the freedom, independence and truly international character of the Secretariat, and would defeat the spirit and the letter of Article 100. Not only were governments not always qualified to pronounce on a candidate but they might be reluctant to consent to the appointment of a member of the political opposition. Nothing should be allowed to "give national governments particular rights in this respect, or permit political pressure on the Secretary-General" (PC/AAB/66, at 51).

135. The Preparatory Commission envisaged limited exceptions to permanent career appointments. The principal higher officers could be appointed under fixed-term contracts not to exceed five years, subject to the possibility of renewal. The Secretary-General must be able to offer temporary appointments to specialists in technical fields as well as persons with special political qualifications. Temporary appointments should be used to accommodate persons from geographical regions inadequately represented. And officials from national services should be able to serve the Organization to strengthen personal contacts between the Secretariat and national administrations and to build up a body of national officials with international experience. Such appointments, in the opinion of the Preparatory Commission, should be for not longer than two years under a system of secondment or leave without pay (PC/20 at 93).

136. The 1982 Report of the International Civil Service Commission (*GAOR*, 37th Session, Supplement No. 30 (A/37(30)) relied directly on these convictions of the Preparatory Commission in its recommendations on the career service which were accepted by the General Assembly in resolution 37/126. The same principles have been affirmed and reaffirmed throughout the Organization's history by successive Secretaries-General, by expert committees, by representatives of the organizations in the common system, and representatives of the staff.

137. The permissible proportion of non-career to career staff has however remained the subject of vigorous debate. At the 11th Session, the Report of the Salary Review Committee, established by General Assembly resolution 975 (X),

1955, while endorsing the concept of a career service, felt that greater use could be made in the United Nations Secretariat of "fixed-term staff obtained largely by secondment from government services, universities and similar institutions" to avoid "complacency and bureaucracy".

> "It has sometimes been argued that non-career staff cannot have the same international loyalties or independence as career staff. The evidence does not support this view. The Committee was impressed with the assurances of the Secretary-General that seconded staff were in his experience extremely zealous in avoiding any tendency toward divided loyalties. [The Committee] could see no objection, either on financial or personnel grounds, if the proportion to be filled on a fixed-term basis, whether by secondment or otherwise, were brought up to say 20 per cent as opportunity offered . . ." (*GAOR*, 11th Session Annexes, Agenda Item 51, doc. A/3209 at paras. 53 and 54.)

The figure of 20 per cent was approved by the General Assembly by resolution 1095 (XL) in February 1957.

138. The decade from the mid-1050s to the mid-1960s saw explicit challenges to the whole concept of a career service. At the 15th General Assembly, the USSR advocated the equal representation on the Secretariat of three groups of member States; the "Socialist" States, the "neutralist" States, and "States members of Western military blocks". A corollary to this proposal was the reduction or phasing out of career appointments and their replacement by fixed-term or seconded staff. A Committee of Experts was appointed in 1959 by General Assembly resolution 1446 (XIV) under the chairmanship of Mr. G. Georges-Picot to review this and other problems of the organization of the Secretariat. The Soviet expert on the Committee, Mr. A. A. Roschin (who replaced Mr. A. A. Fomin) urged, as a matter of priority:

> "*(a)* to put an end immediately to the practice of granting permanent contracts to members of the Secretariat regardless of their nationality . . . that permanent contracts for Under-Secretaries and Directors (D-2 level) be eliminated entirely, that the number of permanent contracts for staff members at the D-1 level be reduced to not more than 30 per cent of the total of such posts and that the number of permanent contracts for staff members in the Professional category be reduced to not more than 40 per cent of the total number of posts in that category" (*GAOR*, 16th Session, Annexes, Agenda Item 61, doc. A/4776, para. 90).

He went on to propose a radical programme of terminations of existing staff.

139. The majority of the Committee rejected this view and reaffirmed the Preparatory Commission's recommendations on a career service. To accommodate demands for greater geographical distribution, however, it contemplated an increase in the proportion of fixed-term staff,

> "to as much as 25 per cent by the end of 1962. The majority of the Committee does not regard this as an excessive proportion. While it is convinced that the bulk of the staff should consist of persons who intend to make service in the Secretariat a career and that the efficiency of the Secretariat is dependent on the existence of a substantial core of career officials, the majority of the Committee agrees that a suitable proportion of officers on fixed-term contracts serves a useful purpose in introducing new blood and new ideas. The majority of the Committee would not recommend the

> adoption of the drastic action suggested by the Soviet expert." (*Ibid.*, at para. 92.)

140. In the Fifth Committee debate considering the Report of the Committee of Experts,

> "many delegations felt that it would not be wise to exceed the proportion of 20 per cent for fixed-term staff in relation to career staff . . . The security of tenure inherent in a career appointment constituted a factor of importance in ensuring the independence and the efficiency of Secretariat officials . . . Admittedly, a limited recruitment of fixed-term staff—for example, on secondment from national services or analogous services—served a useful purpose . . . But to exceed 20 per cent would not be wise. Short-term service with the United Nations, if carried much beyond that point, might weaken the concept of the Secretariat as a truly international body . . ." (*GAOR*, 16th Session, Annexes, Agenda Item 64, doc. A/5063.)

A resolution incorporating the 25 per cent limit failed to gain a majority.

141. At the 18th General Assembly, Secretary-General U Thant explained the steady rise in the proportion of fixed-term staff by recruitment efforts in countries who could not spare candidates for career appointments. By converting some fixed-term appointments to career positions he expected to maintain the proportion at about 25 per cent (*GAOR*, 18th Session, Annexes, Agenda Item 66, doc. A/C.5/987).

By the 20th Session the proportion was 28.1 per cent, and the Fifth Committee once again debated both the added expense and the effect on efficiency, continuity and experience of so high a proportion of non-career posts (*GAOR*, 20th Session, Annexes, Agenda Item 84, doc. A/6215).

By 1968, with the proportion at 31.8 per cent, close to 1 in 3, the Secretary-General warned the General Assembly that the continuing decline in the relative strength of career staff had "reached a stage where it could no longer be regarded as a development of limited significance" (*GAOR*, 23rd Session, Annexes, Agenda Item 81, at 14-15). In 1969 the General Assembly, by resolution 2539 (XXIV), recognized that "long-term service is conducive to greater efficiency in certain posts entailing complex duties and responsibilities". A limited guideline was set out in 1970 by resolution 2736 (XXV), which said, *inter alia*, that for posts "involving complex duties and responsibilities" preference should be given to those willing to accept a career appointment or a fixed-term appointment of not less than five years.

142. A table in the 1982 ICSC Report showed the rapid increase in the percentage of fixed-term to career staff: 34 per cent in 1975, 36 per cent in 1978, 39 per cent in 1981. It has now topped 40 per cent. It was against this background, and specifically with reference to the recommendations of the Preparatory Commission, that the ICSC made the proposal that was incorporated in General Assembly resolution 37/126, IV. The ICSC recognized the difficulties, including that

> "some member States do not wish their nationals to serve in international organizations for more than limited terms; such staff usually serve on secondment from their country's own career service" (*GAOR*, 37th Session, Supplement No. 30 (A/37/30), at p. 114).

Evidently, however, it concluded that at some point the percentage of fixed-term appointments might reach the "critical mass" of with Hammarskjöld had warned, at which time the nature of the Secretariat would change from an international organization into something like an inter-governmental one, contrary to the Charter.

143. The other consideration, strongly urged by FICSA and recommended by ICSAB, the predecessor of the ICSC, was the basic inequity of having two classes of staff, often doing jobs of similar responsibility, but with different career expectancies, different benefits and different degrees of security.

144. In recommending every reasonable consideration for a career appointment upon completion of five years of service, the Commission specifically included seconded staff.

> "With regard to staff on secondment, the majority of the members of the Commission stressed the need for each organization, in situations where it wished to retain the services of the staff member beyond the period of the initial agreement, to take fully into account the views of the releasing government. The other members, while not objecting to this, felt that this should not in any way prejudice the individual rights of the staff member." (*Ibid.*, p. 92, para. 33 and p. 120, para. 66.)

As the dissenting opinion in Judgement No. 333 points out, "this paragraph makes it quite clear that the government's view was not to be decisive but was to be fully taken into account together with all other relevant factors".

145. The Report sets out some of the factors that would be relevant, *inter alia*: "the nature of the functions to be performed, whether continuing or non-continuing; the structural pattern of the organization; and the source of funding of posts" (*ibid.*, p. 96, para. 6). Factors *not* relevant would include nationality.

> "The nationality of a serving staff member should not be a criterion in the decision whether or not to grant permanent status; the nationality factor is taken fully into account at the time of recruitment and should not thereafter be a factor in the determination of the staff member's career, which should be decided solely on grounds of the organization's needs and the staff member's merits." (*Ibid.*, p. 115, para. 49.)

National pressures, in the view of the Commission, may not be factors in any recruitment decision:

> "(xi) Executive heads, chiefs of personnel, career development and placement specialists and managers should resist pressures from any national government to show favouritism in the development of careers of its citizens. The executive head should appeal to the member States . . . to refrain from exerting such pressures;
>
> (xii) Positions within an organization should not be designated (either formally or informally) as the specific domain of any country or group of countries." (*Ibid.*, p. 98.)

146. The General Assembly, at its 37th Session, "welcomed" the ICSC report and recorded no objections to any material part of it. The following year it reaffirmed the decision and, in resolution 38/232, VI, paragraph 5, recommended:

> "that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment following a period of five years' satisfactory service on fixed-term contracts".

The passage of the resolution under which the Applicant claimed a right to reasonable consideration, therefore, was not a casual expression of good will but a conscious decision on the part of the General Assembly to reassert the concept of a career service as the only way of giving effect to Chapter XV of the Charter. The General Assembly had never abandoned the concept of a career service, as the foregoing historical record shows, and had defeated all proposals to alter the nature of the Organization. But previous attempts to draw the line at a certain ratio of fixed-term to permanent appointments had foundered under pressures for more equitable geographical distribution and other desiderata. This resolution placed a limit, not on the percentage of fixed-term staff, but on the length of the fixed-term contract itself.

147. The Applicant fell within the terms of the resolution as to both merit and continuity. Moreover, he fell within the General Assembly's and the ICSC's profile of relevant factors: he occupied a permanent, budgeted post, whose functions were continuing, and which involved "complex duties and responsibilities", for which preference should be given to those willing to accept a career appointment.

148. The Tribunal's Judgement defeats the very purpose which the ICSC and the General Assembly intended to promote: the reaffirmation of the primacy of the career service, open to all, on the basis of merit, who have demonstrated their ability to do the job. It carves out a great swath of exceptions. It permits a government to veto otherwise qualified candidates, and it limits the ability of the Secretary-General to offer a career open to talent, wherever in the world such talent may be found.

149. Wherefore the Applicant respectfully submits that the Judgement's conclusions are contrary to the letter of the ICSC report accepted by the General Assembly, and are alien to the spirit of Chapter XV of the Charter.

(viii) *Conclusion*

150. Wherefore the Applicant respectfully requests the Court to find that the Tribunal, in Judgement No. 333, erred on questions of law relating to the Charter, by placing considerations of nationality above the "paramount" principle of merit; by sanctioning involvement of a government in internal procedures of staff appointment in disregard of the principle of neutrality; by placing restrictions on eligibility in violation of the principle of equality; by endorsing a delegation of the power of appointment and an abuse of discretionary powers offensive to the administrative principles of the Charter; and by undermining the concept of a career international service as intended by the Organization's founders, and as reaffirmed, over the years, by its constituent bodies. The Applicant respectfully prays that the Court advise that Judgement No. 333 should be set aside under this ground of challenge.

(Signed) Diana BOERNSTEIN,

Counsel for Vladimir Yakimetz.

22 February 1985.

Annex A

STATEMENT OF THE UNITED NATIONS STAFF UNION IN RESPECT OF JUDGEMENT No. 333 (*Yakimetz* v. *the Secretary-General of the United Nations)*

The Staff Union has followed very closely the case brought by a former staff member, Vladimir Yakimetz, challenging the decision of the Secretary-General not to consider a further extension of his contract as well as the possibility of a career appointment following the expiration of his previous contract which was based upon secondment from his national Government.

The Staff Union feels that this case has substantial implications for the independence and integrity of the international civil service. It views with alarm the failure of the United Nations administration to defend the rights of this individual staff member and the apparent political influence which has interfered with the proper adjudication of this case.

The staff are further alarmed by the implications that support of this decision would have for the career international service. It apparently ignores the General Assembly's statement in resolution 35/210 "that no post should be considered the exclusive preserve of any member State or group of States . . ." and the clear principle of the independence of the Secretariat outlined in Article 100 of the Charter.

In accepting his appointment, the Secretary-General stated on 15 December 1981:

> "I am to head a Secretariat which must preserve its basic sense as an authentic international civil service so as genuinely to serve the interests of the international community. In accordance with the Charter, this necessarily entails strict independence with respect to the national interests of the States which are part of the Organization."

He further stated, in an address to the staff on 12 January 1982:

> "As part of my effort to maintain the independent status of the Secretariat, I shall see to it that the career service of the staff will not be adversely affected by any considerations unrelated to merits. Specifically, I wish to reassure the staff that in matters related to career development, nationality as such will not be considered as a relevant factor. As much as any organization, and perhaps more than most, the United Nations needs to reward merit and put a premium on good performance."

The staff member's qualifications and merit have never been disputed. The sole question relates to his status and in particular to his nationality. In the view of the staff, should any government be permitted to raise objections to continued employment on the basis of internal political considerations, the entire concept of an independent international civil service is thrown into jeopardy.

Apart from the question of his nationality, there was no impediment for his being considered for further employment. Article 101, paragraph 3, of the Charter is explicit in stating that the "paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

The contested decision would clearly thwart the purpose of the General Assembly's resolution 37/126 which decided "that staff members on fixed term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". In this instance, a legal expectancy of continued employment was created, an expectancy which has been explicitly recognized in prior tribunal decisions.

If this principle is to be upheld, it cannot be made subject to exceptions based upon purely political considerations.

Given the implications that such a precedent will have, we feel it encumbent upon all concerned to assure that the final decision rests upon a valid and impartial legal determination. For this reason we support the Applicant's request to the General Assembly's Committee on Applications for Review of Administrative Tribunal Decisions with a view to requesting an advisory opinion from the International Court of Justice.

Issued 20 August 1984.

(Signed) George IRVING,
President,
Staff Committee.

2. WRITTEN STATEMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS

In reply to letters No. 72530 and No. 72531 dated 28 September 1984 from the Registrar of the International Court of Justice of the United Nations, containing questions submitted to the International Court of Justice for advisory opinion, the Soviet side communicate the following.

Question: In its Judgement No. 333 of 8 June 1984 (AT/DEC/333) did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of Applicant after the expiry of his contract on 26 December 1983?

Answer: In examining the case referred to it the Administrative Tribunal assesses it in a comprehensive manner. The Tribunal is under no obligation automatically to follow all the points in the applicant's claim, but, as a judicial body, it must itself determine in every specific instance the scope of its jurisdiction, as is clearly stated in Article 2, paragraph 3, of its Statute.

Following this principle, which is generally accepted in judicial practice, the Tribunal in paragraph I of its Judgement correctly pointed out that it could concern itself only with the juridical aspect of the case and formulated the legal issues which constitute the substance of the case. In this connection it pointed out that the issues "are not independent of each other; sometimes conclusions reached on any of them influence those on others".

In its Judgement the tribunal provided answers to all legal aspects of the case, including the question, raised in Applicant's claim, concerning the existence of legal impediments to his further employment with the United Nations. This question implies examining, first, a possible extension of a one-year contract after its expiry on 26 December 1983; second, its conversion to a career appointment; third, the conclusion of a new contract. As is evident from the Tribunal's materials, it examined the three possibilities and came to appropriate conclusions.

Paragraph II of the Judgement points out that Applicant worked "on secondment from the USSR Government", which was a "special condition" in his contract. It is important to note in this regard that Applicant's appointments of 28 December 1977 and 8 December 1982 were considered by all the three parties involved—the defendant, the USSR Government and Applicant—as secondment from the USSR Government. Proceeding from its previous practice of examining cases involving secondment, the Tribunal in paragraph IV concluded that "any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of the three parties involved". It is therefore clear that the absence of such trilateral agreement constitutes a legal impediment to the extension of Applicant's fixed-term contract.

The question of a possible conversion of the appointment of a United Nations employee working on a fixed-term contract is regulated by Rule 104.12 *(b)* of the Staff Rules which states that a fixed-term appointment "does not carry any expectancy of a renewal or of conversion to any other type of appointment". The applicability of this rule to the case in question is examined in paragraph IX of the Judgement, which points out that Applicant's attention was specifically drawn to this rule in a letter by the Secretary-General dated 11 March 1983 in connection with Applicant's request for an extension of his contract.

The Tribunal also examined the question of the possibility of Applicant's further employment in the United Nations on the basis of concluding with him a *separate new contract. Applicant was seconded for employment with the United* Nations by the Government of the Union of Soviet Socialist Republics and therefore his statement that he resigned "from all official positions" which he had held "in the Soviet Government" and his request that the United States Government grant him asylum naturally raised the question of his acceptability as an international civil servant. The Tribunal was guided by the generally accepted opinion, reflected in the report of the Fifth Committee (doc. A/2615), that

> "international officials should be true representatives of the cultures and the personality of the country of which they are nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations".

The Tribunal followed this premise in its previous practice, in particular, in its Judgement No. 326 *(Fischman)*. This premise reflects the established practice of applying the principle laid down in Article 101, paragraph 3, of the United Nations Charter, which calls for "recruiting the staff on as wide a geographical basis as possible". It is precisely in this context that this premise is referred to in the report of the Fifth Committee.

The Tribunal also made reference to the information circular ST/AFS/SER.A/238. In paragraph 12 of that circular, which, as stated in its preamble, should serve as guidance for the Secretary-General, it is stated, in particular, that

> "the decision of a staff member to remain on or require permanent residence status in . . . [the] country [of his duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the professional category and it is particularly undesirable in the case of staff members recruited on the geographical basis."

Thus, the Tribunal gave comprehensive consideration to the juridical side of the question of the possibility of Applicant's further employment in the United Nations. Its decision clearly sets forth the specific legal impediments to Applicant's further employment in the Organization in light of the Staff Rules and other relevant documents of the United Nations.

Question: 2. Did the United Nations Administrative Tribunal in the same Judgement No. 333 err on questions of law relating to provisions of the Charter of the United Nations?

Answer: The provisions resorted to by Applicant were Article 101, paragraph 1, Article 100, paragraph 1, and Articles 8 and 2, paragraph 1, of the Charter of the United Nations.

In accordance with Article 101, paragraph 1, "the staff shall be appointed by the Secretary-General under regulations established by the General Assembly". This provision of the Charter gives the Secretary-General of the United Nations as the chief administrative officer of the Organization exceptional powers in appointing staff within the framework established by the Staff Rules as well as by relevant subsequent resolutions of the General Assembly, specifically by Rule 104.12 *(b)* and resolution 37/126, IV, paragraph 5. The applicability of Rule 104.12 *(b)* has been discussed above in the context of the question of the legal impediments to Applicant's further employment in the United Nations.

Resolution 37/126, IV, paragraph 5, provides that "staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment".

In paragraphs XIV-XVIII the Tribunal, on the basis of the analysis of the steps taken by the Secretary-General to consider Applicant's requests concerning the extension of his contract or giving him a career appointment, concludes that in this specific instance only the Secretary-General is empowered to decide what is the meaning of the phrase "every reasonable consideration". The Secretary-General clearly determined that, taking into account that Applicant had been seconded for a one-year period—from 27 December 1982 to 26 December 1983,—he could not be appointed on a probation basis for the purpose of subsequently offering him a contract on the basis of a career appointment. Thus, he has duly exercised his discretionary powers.

In accordance with Article 100, paragraph 1,

> "in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

Applicant's assertion that the Secretary-General violated the aforementioned provision is groundless, with no arguments adduced to support it. Quite correctly, the Tribunal in paragraph XIX qualified this assertion by Applicant as unfounded and concluded that the Secretary-General's actions in exercising his discretionary powers "cannot be impugned on any of the grounds stated above".

Article 8 states that the United Nations "shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs". It is obvious that Article 8 is not at all relevant to the case in question.

Article 2, paragraph 1, provides that the United Nations "is based on the principle of the sovereign equality of all its Members". This provision has no relevance to the case either and any reference to it is totally pointless.

Thus in its Judgement No. 333 the Tribunal assessed the case in a comprehensive manner and produced the decision regarding all the legal issues involved, taking into account the relevant provisions of the United Nations Charter. The submission of the two aforementioned questions to the International Court of Justice of the United Nations is legally inappropriate and has no grounds in law whatsoever.

3. EXPOSÉ ÉCRIT DU GOUVERNEMENT ITALIEN

1. Le jugement n° 333 du Tribunal administratif des Nations Unies a une signification tout à fait particulière, en raison de la complexité des aspects juridiques qu'il comporte et de ses possibles retombées sur le bon fonctionnement du Secrétariat des Nations Unies, dont l'indépendance d'action est pour l'Italie d'importance fondamentale.

La pratique consistant dans le détachement aux Nations Unies d'employés appartenant aux administrations nationales des Etats Membres devient toujours plus fréquente et a pris des dimensions telles pouvant faire naître certains doutes sur sa compatibilité avec le Statut de l'ONU. La situation actuelle s'aggraverait encore si les employés détachés, en raison de l'incertitude créée par le susdit jugement, devaient craindre que, au cas où cesserait leur lien avec l'administration nationale — du fait de révocation ou n'importe quelle autre raison —, toute possibilité d'un emploi aux Nations Unies, à un titre autre que celui du détachement, leur serait interdite.

Les administrations nationales auraient ainsi un instrument de pression qui pourrait amener les employés détachés à sacrifier les intérêts de l'Organisation en faveur de ceux de leur administration nationale.

2. Dans les cas précédents où l'avis consultatif de la Cour avait été requis, la Cour, dans l'exercice du pouvoir discrétionnaire qui lui permet de décider librement si rendre ou non l'avis demandé, a effectué un examen préliminaire des différentes circonstances. Dans le cas en étude, puisque la procédure de requête d'avis n'a pas été démarrée par un Etat, ne sembleraient pas exister les circonstances qui, dans le cas *Mortished*, avaient amené la Cour à s'interroger avec les plus grands scrupules sur l'opportunité de rendre un avis ; en revanche a une importance particulière la considération qui, aussi dans le cas précédent, a enfin amené la Cour à se prononcer, à savoir que « la stabilité et l'efficacité des organisations internationales, dont l'Organisation des Nations Unies représente l'exemple suprême, sont d'une importance si fondamentale pour l'ordre mondial que la Cour ne saurait manquer d'aider un organe subsidiaire de l'Assemblée générale des Nations Unies à asseoir son fonctionnement sur des bases fermes et sûres »[1].

3. Dans les avis consultatifs rendus au cours d'occasions précédentes, la Cour a précisé que sa tâche n'est pas celle d'une instance d'appel pour les jugements du Tribunal administratif, qui devrait revoir toutes les questions de fait et de droit examinées par le Tribunal ; par conséquent de part italienne, on se limitera à exposer quelques considérations relatives aux deux points pour lesquels le Comité des demandes de réformation a décidé, conformément à l'article 11 du statut du Tribunal, de demander l'avis consultatif de la Cour, à savoir :

4. « Dans son jugement n° 333 du 8 juin 1984, le Tribunal administratif des Nations Unies a-t-il omis d'exercer sa juridiction, ne répondant pas à la demande relative à l'existence d'un obstacle juridique à la continuation de l'emploi du requérant aux Nations Unies, à l'échéance de son contrat le 26 décembre 1983 ? »

C'est là en effet la question principale qui avait été soumise au Tribunal par le requérant Yakimetz. Il s'agissait de décider si le fait que Yakimetz avait servi jusqu'en 1983 aux Nations Unies en tant que détaché de son administration nationale, lui empêchait d'obtenir, sans le consensus de son administration, à l'échéance du contrat de détachement, une nomination à un autre titre aux Nations Unies, et par conséquent si le manque dudit consensus représentait une entrave juridique rendant impossible un nouvel emploi du réquérant aux Nations Unies.

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[1] *C.I.J. Recueil 1982*, p. 347.

Dans sa requête au Tribunal du 6 janvier 1984, Yakimetz demande au Tribunal, en premier lieu, «de juger et déclarer qu'il n'y avait aucun obstacle légal à la continuation de son contrat, le 26 décembre 1983».

Cette question était citée en premier lieu par le réquérant, non seulement parce qu'il s'agissait de celle dans laquelle était contenu le problème juridique le plus important, mais aussi parce que d'un point de vue logique cette question devait être décidée la première: en effet, à sa solution, dans un sens ou l'autre, était subordonnée la possibilité de passer à examiner les deux autres requêtes adressées au Tribunal par le requérant, à savoir: «juger et déclarer que lui avait été illégalement refusé le droit à être pris en considération raisonnable pour une nomination fixe» et «juger et déclarer qu'il avait une expectative légitime à être nouvellement employé».

Si en effet, au terme de l'examen de la question relative à l'existence ou non d'un obstacle juridique empêchant toute forme de nouvel emploi, le Tribunal avait conclu que l'obstacle existait, il aurait été impossible de passer à examiner les deux autres questions. En effet, ayant décidé l'inadmissibilité d'un engagement au point de vue juridique, on ne peut qu'en tirer la conclusion qu'il est impossible de prendre en considération l'opportunité d'un tel engagement et d'en peser le pour et le contre; quant à l'existence d'une «expectative légitime» à l'égard du renouvellement du contrat, il n'y aurait pas eu de sens d'examiner cette question, après avoir conclu que le renouvellement du contrat était *impossible* du point de vue juridique. Il est évident que, si après avoir décidé qu'il existait un obstacle juridique, rendant impossible la continuation de l'emploi, le Tribunal avait omis d'examiner les deux autres points, le manque d'un tel examen n'aurait pas été une «omission de juridiction», mais seulement la conséquence inévitable de la conclusion atteinte sur le premier point.

Ce n'est qu'après avoir décidé qu'il n'y avait pas d'obstacles juridiques que le Tribunal aurait pu passer à examiner si, outre à l'absence d'obstacles, existait aussi le droit à une «considération raisonnable» pour «un engagement permanent», de même qu'une «expectative légitime» pour le renouvellement du contrat.

Le Tribunal néanmoins, au lieu d'examiner tout d'abord le premier point, de la solution duquel dépendait la possibilité de passer à examiner les deux autres, a tranché avant tout le deuxième point, a traité le troisième d'une manière qui a ressenti du manque d'examen du premier point et a complètement omis de décider au sujet du premier point.

Pendant les discussions du Comité des demandes de réformation, est ressorti un clivage d'opinions entre les juristes de formation latine, qui constataient dans la façon de procéder du Tribunal «une erreur essentielle de procédure, qui a donné lieu a un maljugé», et ceux de formation anglo-saxonne, pour lesquels il s'agissait plutôt d'une «omission de juridiction». En réalité, du fait que le Tribunal ait omis de se prononcer sur la première question fondamentale relative à la présence ou non d'un obstacle juridique, sont nées des distorsions également sur la façon dont le Tribunal a affronté et tranché les deux autres points, et par conséquent outre au deuxième des motifs de revision prévus par l'article 11 du statut du Tribunal (omission de juridiction), est valable aussi le dernier (erreur essentielle de procédure ayant donné lieu à un maljugé). Néanmoins, puisque le Comité de réformation n'a pas demandé l'avis de la Cour au sujet de ce dernier point, on ne s'y attarde pas plus longuement, quoique la Cour ait estimé, dans son avis du 20 juillet 1982 relatif au cas *Mortished*, de pouvoir librement interpréter les questions formulées par le Comité, en vue de tous les possibles motifs de revision prévus par l'article 11. Les considérations ci-dessus servent de toute façon à faire ressortir que le fait que le Tribunal ait omis de se prononcer sur l'existence d'un obstacle légal ne saurait être considéré comme une omission moindre, et que la question omise était justement la principale, soit parce que à elle étaient rattachés les problèmes juridiques les plus importants, soit parce que de sa solution, dans un sens ou l'autre, dépendait la possibilité de passer à un examen des points successifs, et donc tout le cours ultérieur de la procédure.

Après avoir mis en évidence l'importance fondamentale de la question faisant l'objet de l'omission de juridiction, puisque au cours des discussions auprès du Comité de réformation certains des intervenants ont observé à raison que « le fait que le Tribunal ait décidé différemment qu'il n'avait été souhaité par le requérant, ne saurait être considéré une omission de juridiction », il faut examiner si le Tribunal a en effet complètement omis de trancher sur l'existence ou non d'un empêchement juridique à la continuation de l'emploi.

Alors que Yakimetz, en énumérant les questions qu'il soumettait à la juridiction du Tribunal, posait en premier lieu celle relative à l'existence d'obstacles juridiques qui auraient empêché la continuation de son emploi, de son côté, le Tribunal, au début du jugement, écrit :

> « Dans cette affaire, les questions juridiques se mêlent à celles politiques. Néanmoins, le Tribunal peut traiter exclusivement les questions juridiques, qui sont les suivantes :
>
> *a)* si l'emploi du requérant auprès des Nations Unies en différentes périodes ait créé une expectative légitime pour la continuation de l'emploi auprès des Nations Unies ;
>
> *b)* si, et en cas affirmatif, en quelle mesure, ait été appliqué le paragraphe 5 de la résolution de l'Assemblée générale 37/1266 (IV) du 17 décembre 1982, qui dit : « Décide que le personnel employé sur la base de nominations à échéances fixes, ayant complété cinq années de suite de service louable, sera pris en considération raisonnable pour un engagement fixe » ;
>
> *c)* les conséquences de l'application des normes et règlements des Nations Unies par rapport à la loi des Etats-Unis sur la résidence et la nationalité. »

Il paraît évident que dans cette énumération des questions sur lesquelles il doit se prononcer, le Tribunal a omis celle relative à l'existence d'un obstacle juridique rendant impossible toute continuation de l'emploi. Le caractère incomplet de l'énumération n'aurait par ailleurs pas de valeur déterminante si le Tribunal avait en effet examiné et décidé aussi la question omise par l'énumération, mais on ne constate nulle part dans le jugement le développement de cette question. Il faut cependant observer qu'au paragraphe IV du jugement le Tribunal se réfère à la lettre du Secrétaire général des Nations Unies, dans laquelle on constate que :

> « la participation de toutes les trois parties en cause (ONU, employé et administration nationale d'origine) étant nécessaire pour le renouvellement de l'affectation du réquérant, ledit renouvellement, compte tenu des circonstances, est impossible ».

Le Tribunal reprend cette constatation du Secrétaire (dont il résulte clairement qu'on affirme l'existence d'un obstacle juridique rendant impossible le renouvellement de l'emploi), sans par ailleurs motiver en aucune façon cette conviction, mais en se bornant à citer deux prononcés précédénts (nº 92, cas *Higgins*, et nº 192, cas *Levcik*), qui concernent un problème bien différent: ni le réquérant ni personne d'autre a jamais mis en doute que le rapport d'emploi à titre de détachement ne peut être prolongé, *toujours à titre de détachement*, qu'avec le consensus des trois parties en cause (et c'est à cela que se réfèrent les précédents sus-cités). Dans le cas en étude néanmoins, il ne s'agissait pas de prolonger, pour une nouvelle période de détachement, le contrat de détachement échu en décembre 1983 (prorogation qui n'aurait pas été possible sans le consensus de l'administration nationale), mais de mettre sur pied, à son échéance, un noveau rapport d'emploi *qui ne serait plus à titre de détachement*: la nécessité ou non, à cette fin, du consensus d'une administration dont la personne à employer ne faisait plus partie était justement la question sur laquelle le Tribunal aurait dû se prononcer. Le Tribunal, au lieu d'examiner et de décider cette question cruciale, se borne à accepter d'emblée la nécessité du consensus — et partant l'existence, faute d'un tel consensus, d'un obstacle empêchant toute continuation d'emploi aux Nations Unies — sans motiver en aucune façon cette conviction et omettant par conséquent d'exercer la juridiction qui lui avait été demandée sur ce point fondamental. Comme conséquence logique de cette conviction — juste ou erronée qu'elle soit — le Tribunal aurait dû conclure, en examinant si au réquérant avait été refusé le droit à la «considération raisonnable» pour la continuation de l'emploi, que l'entrave juridique réprésentée par le manque de consensus de l'administration nationale empêchait de prendre en considération la prorogation de l'emploi même à un autre titre que le détachement. C'est là du reste la position prise par le Secrétaire général des Nations Unies dans sa lettre en date du 21 décembre 1984, de même que dans la déclaration dissidente du président du Tribunal.

Dans la lettre du Secrétaire général au réquérant on affirme:

> «dans vos lettres, en référence à votre ancienneté de service et aux évaluations exprimées par vos supérieurs, vous affirmez que «en conditions analogues, la plupart des employés s'attendraient à ce que leur candidature soit prise en considération raisonnable pour une nomination permanente, comme cela est prescrit par l'Assemblée générale dans sa résolution 37/126 (IV). *Votre situation cependant n'est pas la même que celle des autres employés avec ancienneté de service analogue à la vôtre, puisque votre contrat actuel a été stipulé sur la base d'un détachement par votre administration nationale.* Vous-même étiez conscient de cette situation qui ne saurait donner lieu à aucune attente de renouvellement *sans l'implication de toutes les parties intéressées à l'origine.*»

D'après cette lettre, il est évident que le Secrétaire général estimait que, contrairement aux autres employés avec ancienneté et mérites de service analogues qui auraient eu le droit à être pris en «consideration raisonnable» pour une nomination permanente, le requérant au contraire, en raison du manque de consensus de l'administration nationale, ne pouvait être pris en considération pour cette nomination.

La même conviction ressort dans la déclaration du président du Tribunal. Il s'agit d'une conviction qui, quoique partant d'une prémisse (existence d'une entrave juridique, empêchant toute continuation de l'emploi) que l'Italie estime sans fondement, a du moins l'avantage d'arriver à une conclusion (impossibilité de prendre en considération la demande du requérant de continuer à être employé à l'ONU) tout à fait logique et cohérente avec la prémisse.

On chercherait en vain la même cohérence dans le jugement du Tribunal lequel, après avoir observé au paragraphe IV que le consensus de l'administration nationale est indispensable pour permettre à un employé qu'elle avait détaché à l'ONU de continuer, la période de détachement ayant pris fin, à travailler à l'ONU à titre différent (et donc qu'en l'absence dudit consensus il y aurait un obstacle juridique empêchant toute prise en considération), affirme pourtant que le requérant *avait le droit* d'être pris en considération pour l'emploi, qu'il y a eu une prise en considération, et que le Secrétaire général de l'ONU, après avoir considéré toutes les circonstances, conformément au Statut et aux Règlements de l'ONU, dans l'exercice de son pouvoir discrétionnaire avait conclu qu'il n'était pas de l'intérêt de l'ONU de continuer à employer Yakimetz. Par ailleurs, ce même Tribunal, se rendant compte qu'il n'était pas possible de soutenir que le Secrétaire général avait donné « toute la considération raisonnable qu'il était possible » à la demande d'emploi du réquérant sans se mettre en opposition avec ce que le Secrétaire lui-même avait affirmé (à savoir que la demande du réquérant n'avait pas été prise en considération du fait de l'existence d'un obstacle juridique qui empêchait cette prise en considération), ressent le besoin de chercher à réparer à cette contradiction évidente et reproche au Secrétaire général de n'avoir pas affirmé clairement qu'à la demande d'emploi du réquérant avait été donnée toute la considération raisonnable qu'il était possible, et conclut le jugement en exprimant sa désapprobation au Secrétaire général pour

> « n'avoir pas précisé en temps utile et en termes spécifiques qu'à la question de l'engagement du réquérant avait été accordée toute la considération raisonnable possible, comme requis par la résolution de l'Assemblée générale ».

Il est significatif que le président du Tribunal ait estimé nécessaire de se dissocier d'un tel reproche, affirmant que, compte tenu de l'impossibilité juridique d'employer à un autre titre un ex-détaché sans le consensus de l'administration nationale, l'emploi du réquérant ne pouvait être pris en considération, et le Secrétaire général ne méritait donc aucun reproche pour n'avoir pas précisé de façon explicite que la demande du réquérant avait été prise en considération, vu qu'au contraire la prise en considération n'avait pas eu lieu, en raison de l'entrave juridique qui l'empêchait.

Des considérations sus-exposées il paraît clairement qu'il n'est pas possible de soutenir que le Tribunal, puisqu'il a décidé que Yakimetz avait le droit d'être pris en considération raisonnable, a par cela même décidé de façon implicite qu'il n'y avait aucun obstacle juridique pouvant empêcher cette prise en considération, et que par conséquent il n'y a eu aucune omission de juridiction relativement à la question de l'existence ou non d'un obstacle.

Tout d'abord il ne paraît pas possible de décider « implicitement », sans aucune motivation, d'une question explicitement soumise à la juridiction du Tribunal, et ensuite on observe que le Tribunal, après avoir affirmé (paragraphe IV du jugement) qu'un obstacle juridique empêchait toute prise en considération, a pu conclure que le réquérant avait été pris en considération uniquement en raison de l'ajustement ci-dessus (reproche au Secrétaire général pour avoir précisé de façon seulement « implicite » que la prise en considération avait eu lieu avec une issue négative, alors que le Secrétaire avait au contraire dit bien explicitement au réquérant qu'il ne pouvait être pris en considération).

En conclusion, de part italienne on est de l'avis que le jugement en discussion est le fruit d'un essai de compromis entre les membres du Tribunal qui affirmaient l'existence d'un obstacle juridique et ceux qui le niaient.

Dans cet essai de compromis, le clivage d'opinions a été réglé d'une part en omettant toute décision de fond sur ce point fondamental et d'autre part en essayant d'amalgamer l'opinion de qui estimait que le requérant avait le droit d'être pris en considération pour la continuation de l'emploi et de qui estimait cette prise de considération impossible. Il est évident que les essais de compromis, si appliqués à un jugement, ne peuvent que conduire à des résultats absolument insatisfaisants du point de vue de la cohérence juridique. L'incohérence évidente du jugement en étude est une des raisons pour lesquelles l'Italie, en tant qu'Etat adhérent à l'ONU et donc vivement intéressé au bon fonctionnement du Tribunal administratif des Nations Unies, a été amenée à présenter un exposé.

4. «Le Tribunal a-t-il commis une erreur sur une question de droit relative aux dispositions du Statut des Nations Unies?»

Les considérations de l'Italie au sujet de ce deuxième point sur lequel l'avis de la Cour a été demandé seront bien plus brèves que celles relatives au premier point, parce que le Tribunal, en omettant d'exercer sa juridiction sur ce qui était le point fondamental en discussion, s'est également soustrait aux observations qui auraient pu lui être adressées, du point de vue de la conformité aux dispositions du Statut de l'ONU, s'il avait rendu sur cette question un jugement motivé.

Au cas ou le Tribunal avait décidé qu'un employé qui a travaillé aux Nations Unies en tant que détaché de l'administration nationale d'origine ne pourrait à la fin de la période de détachement continuer son emploi aux Nations Unies à un autre titre sans le consensus de l'administration nationale à laquelle il appartenait, de part italienne on aurait estimé cette décision en opposition avec l'article 8, l'article 100, paragraphes 1 et 2, et l'article 101, paragraphes 1 et 3, du Statut des Nations Unies.

Cependant, il ne paraît pas utile de développer d'autres considérations à ce sujet. En effet, faute des motivations que le Tribunal aurait adoptées à l'appui de sa décision s'il avait exercé sa juridiction sur ce point, il est impossible de critiquer, en fondant toute critique sur de simples hypothèses, l'interprétation du Statut que le tribunal aurait pu donner. Il est d'autre part évident que les critiques possibles relatives à la conformité au Statut, auxquelles le Tribunal s'est soustrait en omettant de décider le point fondamental soumis à sa juridiction, ne peuvent qu'être ajoutées à celles déjà formulées au sujet de cette omission. Il est important à présent de réparer à l'omission du Tribunal moyennant l'avis consultatif de la Cour.

Quant à la compatibilité avec le Statut de l'ONU de la façon dont le Tribunal a tranché la question du droit à une considération raisonnable pour un engagement permanent, compte tenu du fait que, comme dit ci-dessus, la décision sur ce point a été déformée par l'omission de juridiction sur la question de l'existence d'un obstacle juridique, on exprime les considérations suivantes.

Le Tribunal estime que la «considération raisonnable» indiquée à la résolution 37/126 de l'Assemblée générale ne devait pas forcément être effectuée par la «Commission pour les nominations et les promotions» des Nations Unies, mais pouvait aussi être effectuée par le Secrétaire général. On pourrait à la rigueur convenir sur cette conclusion; ce qu'on estime inacceptable, c'est l'interprétation du Tribunal au sujet de l'étendue du pouvoir discrétionnaire relevant du Secrétaire général lorsqu'il effectue cette considération raisonnable. Pour être véritablement «raisonnable», cette considération devrait avant tout être effectuée aux termes de l'article 101 du Statut de l'ONU, selon lequel

> «la considération dominante pour le recrutement et la fixation des conditions d'emploi du personnel doit être la nécessité d'assurer à l'Organisation les services de personnes possédant les plus hautes qualités de travail, de compétence et d'intégrité».

Dans le texte du jugement, les capacités professionnelles du requérant — qui aux termes de l'article 101 auraient dû être considérées en premier lieu — ne sont même pas mentionnées. Les seuls éléments explicitement mentionnés comme étant la cause de l'issue négative de la prise en considération sont le manque de liens entre le réquérant et son pays d'origine et le manque de consensus de ce pays pour la continuation de l'emploi.

On est par conséquent de l'avis que le Tribunal, lorsqu'il a estimé correct un exercice de pouvoir discrétionnaire par lequel on a attribué à des éléments non mentionnés à l'article 101 du Statut une valeur prédominante par rapport à ceux qui, selon cet article, auraient dû avoir une importance prédominante (ou plutôt, lorsqu'il a pris en considération uniquement des éléments non prévus par l'article 101, sans tenir aucun compte des éléments qui — selon cet article — doivent primer), a fait erreur au sujet d'une question de droit relative aux dispositions du Statut des Nations Unies.

4. WRITTEN STATEMENT OF THE GOVERNMENT OF CANADA

Pursuant to the provisions of Article 66 (2) of the Statute of the International Court of Justice, and in response to the invitation addressed to the Government of Canada by the Registrar of the International Court of Justice on 28 September 1984, the Government of Canada wishes to submit certain general comments on Judgement No. 333 of the United Nations Administrative Tribunal.

The International Court of Justice has been requested by the Committee on Applications for Review of Administrative Tribunal Judgements to provide an advisory opinion in response to two questions:

(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the applicant after the expiry of his contract on 26 December 1983?

(2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?

It is the intention of the Government of Canada to submit comments solely with respect to issues arising from question number 2. Further, the Government of Canada does not intend to make any comments on the facts or merits of the case heard by the Administrative Tribunal, but rather to present its views with respect to the scope and proper interpretation of Articles 100 and 101 of the United Nations Charter.

Articles 100 and 101 of the United Nations Charter are based in large measure on amendments proposed by the Canadian delegation to the United Nations Conference on International Organization held in San Francisco in 1945. At the time these articles were adopted, Ambassador Pearson, speaking on behalf of Canada, made the following statement:

> "We have laid down provisions for an international secretariat—provisions which may prove to be of greater consequence in the development of international co-operation than certain other more exciting and controversial paragraphs of our Charter. We have, in fact, drawn up a charter for an international civil service, and done it in such a way as to ensure, in so far as we can by any written provisions, that this service will be based on the independence, integrity and efficiency of its members." (*Documents of the United Nations Conference*, Vol. VI, doc. 1186, p. 14.)

To ensure the independence of the Secretary-General in staffing matters, and to ensure that questions of merit were the paramount consideration in such matters, Article 100 of the United Nations Charter expressly enjoins the Secretary-General or his staff from seeking instructions from any authority external to the United Nations. Concomitantly, member States are to refrain from seeking to influence the Secretary-General and his staff in such matters. Staff appointments are the sole preserve of the Secretary-General, subject only to regulations established by the General Assembly and to the paramount consideration of securing the highest standards of efficiency, competence, and integrity. Considerations of geographical distribution are subordinate to this principle.

To the extent that the request for an advisory opinion from the Court raises, in part, the question of the proper application of the United Nations Charter in cases of secondment, the Government of Canada wishes to submit its views on the nature of a secondment.

The Government of Canada recognizes that secondments may be a useful tool to encourage a wider selection of staff both geographically and in terms of experience. This tool, however, must be carefully regulated and must comply with the principles of the Charter.

The Government of Canada submits that the only interpretation of secondment that is consistent with the terms of the Charter is that in such an arrangement an individual makes his services available to the United Nations Secretariat, while the member State concerned grants the individual a right to return to his previous employment. Any interpretation that seeks to provide member States with a veto power over any staffing decision of the Secretary-General is contrary to the Charter.

The Secretary-General undoubtedly has a legitimate interest in consulting with member States on staff appointments in the interests of securing the highest standard of efficiency, competence and integrity, or to seek out staff to improve the geographical distribution of employees in the Secretariat. Indeed, the relationship of an employee with his or her country of nationality may be a factor in determining the extent to which an individual fulfills the requirements of Article 101. The views of the member State, in this regard, may be a relevant factor but cannot be the sole criterion in decisions of the Secretary-General with respect to secondments.

If the appointment or re-appointment of an employee were refused solely for want of the consent of the country of the employee's nationality, or indeed of any other member State, such decision would be contrary to Articles 100 and 101 of the United Nations Charter.

The Government of Canada trusts that the Court will take into account this interpretation of the United Nations Charter in making its decision with respect to whether the United Nations Administrative Tribunal erred in law on a question relating to provisions of the Charter of the United Nations.

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5. WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

A. Questions Presented

On 23 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements (Committee) requested an advisory opinion of the International Court of Justice (Court) with respect to the following two questions:

> "(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

B. The Court's Jurisdiction

The authority for invoking the jurisdiction of the Court to render an advisory opinion is found in the Statute of the Court, which provides in Article 65 (1):

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The General Assembly, pursuant to Article 96, paragraph 2, of the Charter of the United Nations (Charter), so authorized the Committee in Article 11 of the Statute of the Administrative Tribunal (Tribunal) (resolution 957 (X) (1955)).

The Committee considered an application submitted by the Applicant, Mr. Vladimir V. Yakimetz, on 23 July 1984 (A/AC.86/R.117), and a response by the Respondent, the Secretary-General of the United Nations (A/AC.86/R/118). On 23 August 1984 the Committee found that a substantial basis existed for two of the Applicant's contentions: that the Tribunal had failed to exercise jurisdiction vested in it by neglecting to address the question of whether the Applicant was legally barred from further employment with the United Nations; and that the Tribunal had erred with respect to questions of law relating to the Charter of the United Nations. The Committee accordingly requested the Court's advisory opinion on these two questions (A/AC.86/R.121).

C. The Court's Discretion

The Court has considered the question of whether to exercise the discretion granted to it by Article 65 of its Statute to render an advisory opinion in two previous cases arising under Article 11 of the Statute of the Administrative Tribunal, and in both cases it decided that it should render the advisory opinion requested (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*, p. 183 (hereinafter: *Fasla*); *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1982*, p. 347 (hereinafter: *Mortished*)). The *Fasla* case is procedurally identical to the instant case, being a request for an advisory opinion by the Committee arising from the objections of an employee of the United Nations Secretariat to a decision by the Tribunal (*I.C.J. Reports 1973*, pp. 169-170). The United States submits that there is no compelling reason for the Court to refuse to render an advisory opinion in the instant case, and that to fail to render such an opinion in this case would be inconsistent with its jurisprudence[1]. The United States accordingly urges the Court to render its opinion as requested.

II. SUMMARY OF THE FACTS

The Applicant, Mr. Yakimetz, was last employed by the Secretariat of the United Nations under a fixed-term contract concluded on 9 December 1982. This was the latest in a series of contracts under which the United Nations had employed the Applicant for a total of about 11 years. This final contract, like all the previous contracts, consisted of a letter of appointment granting the Applicant a fixed-term appointment. In this case, the appointment ended on 26 December 1983. The letter of appointment contained in the section entitled "Special Conditions" the statement "On secondment from the Government of the Union of Soviet Socialist Republics". The letter of appointment for the Applicant's immediately previous term of service, dated 27 December 1977, had contained no reference to secondment. Prior to beginning that penultimate term of service, the Applicant had been a student of economics.

On 9 February 1983 the Applicant began the process of changing his nationality.

On 10 February 1983 the Applicant informed the Soviet Government that he was severing whatever ties he had with it.

On 23 November 1983 the Repondent informed the Applicant "that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983"[2]. This decision was not made in response to any application by the Applicant to the officials responsible for personnel policy asking that his employment with the United Nations be extended[3].

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[1] In *Fasla*, the Court stated that it "has no doubt that, in the circumstances of the present case [which were identical to the case now before the Court], it should comply with request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion" (*I.C.J. Reports 1973*, p. 183).

[2] In fact, it is not the practice of the United Nations to "extend" fixed-term appointments. As may be seen by examining the history of the Applicant's employment with the Respondent in this case, when the Organization wishes to continue employing an employee whose fixed-term contract is expiring, the practice is to make a new, and completely separate, contract (whether fixed-term or career) based upon a new letter of appointment that becomes effective at the end of the expiring appointment.

[3] In his letter of 1 March 1983 to the Respondent asking for the Respondent's views concerning the effect of placing the Applicant on administrative leave, the Applicant had referred to "the possible extension of his appointment". This tentative and hypothetical reference, coming some eight months prior to the Respondent's decision not to extend the Applicant's employment on a fixed-term basis, cannot be considered an application in any formal sense.

Nor does the record show that the Applicant's supervisor, Mr. Hansen, at that time recommended to the responsible officials of the personnel service that the Applicant's employment be extended, though as early as 8 February 1983 he had communicated in writing to the Applicant his intention to recommend an extension of his employment on a fixed-term basis (i.e., the conclusion of a new fixed-term contract)[1]. In his letter of 2 December 1983 to Mr. Nègre, the Assistant Secretary-General for Personnel Services, Mr. Hansen reiterated his desire to have the Applicant continue his employment with the United Nations, stating that "[i]t is in the best interest of the Office to continue to have the services of Mr. Yakimetz".

On 13 December 1983 the Applicant requested the Joint Appeals Board to reverse the decision of the Respondent not to continue to employ him on the basis of a new fixed-term contract. In his request, the Applicant notes that:

> "I was given to understand, both verbally and in writing, that my Department intended to recommend a further extension of my appointment or conversion to a career position . . . I understand that such a recommendation has been made . . . Given this service record and these assurances, and after six years of continuous service, most staff members would have an expectancy that their candidacy for a career appointment would be 'given every reasonable consideration', as General Assembly resolution 37/126, IV, requires."

The foregoing indicates unambiguously that the Applicant wished to be considered for a career appointment and, if that were not available, for another fixed-term appointment. There was no mention of secondment.

On 21 December 1983 the Respondent replied to the Applicant's request of 13 December. That reply states in pertinent part:

> ". . . in your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be "given every reasonable consideration", as General Assembly resolution 37/126, IV, requires'.
>
> Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract was concluded on the basis of a secondment from your national civil service. *At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement* which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.
>
> Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in Staff Rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.
>
> *In view of the foregoing*, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the deci-

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[1] That no recommendation had been made as of 23 November 1983 seems apparent from the letter sent by the Applicant's supervisor to the Assistant Secretary-General, OPS, on 2 December 1983 which states: "I find it extraordinary that such a decision should be taken *without consulting the head of the Office concerned.*" (Emphasis added.)

> sion communicated to you by letter of *23 November 1983*. That decision is maintained and, therefore, *the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment.*" (Emphasis added.)

The foregoing shows that, at the time it took the action complained of by the Applicant, the Respondent believed it had "agreed" with the Government of the USSR to limit the Applicant's service with the United Nations to a period co-terminous with the expiry of the letter of appointment concluded on 9 December 1982. It shows that the Respondent believed that the Applicant had been seconded from his "national civil service" to the United Nations in the contract of 9 December 1982, that the so-called "agreement" arose from that secondment relationship, and that the Applicant had been made aware of it.

Finally and most importantly, the Respondent's letter of 21 December 1983 establishes the Respondent's belief that the "agreement" with the Soviet Government precluded it not only from "extending" the Applicant's *fixed-term* appointment, as had been indicated in its letter of 23 November, but, in addition, to allowing the Applicant's name to be "'forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for *career* appointment". (Emphasis added.)

That the Respondent in fact held these views and based its actions with respect to the Applicant's request for continued employment upon them is not only made clear by the contents of the letters of 23 November and 21 December 1983. It is made clear, as well, by what the letters *did not* contain (i.e., any independent rationale for the Respondent's extraordinary course of conduct after 10 February 1983). It is consistent, in addition, with three contemporaneous considered statements by United Nations officials. The United Nations press spokesman said on 4 January 1984 that the Applicant's contract "had not been renewed because the Soviet Government had not renewed the secondment" (UN Daily Press Briefing, 4 January 1984). The *New York Times* of 4 January 1984 reported an interview with Mr. de Olivares of the Secretary-General's Office and included the following passage: "To have the contract extended, Mr. Olivares said, Soviet consent was essential. But, he said, 'The Soviets refused'." Finally Mr. Ruedas, the Under-Secretary-General for Administration and Management, wrote to the *New York Times* on 4 January 1984, stating in pertinent part that "a person who is on loan returns to his government unless that government agrees otherwise—a principle applicable in all cases, and not only those involving the USSR"[1],[2] (*New York Times*, 25 January 1984).

On 6 January 1984 the Applicant filed his application with the Tribunal.

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[1] In his *Answer*, written several months after the events in question, the Respondent seeks to distance itself from the letter of 21 December and the statements made by responsible officials of the Secretariat, claiming that the Respondent had not perceived itself bound by an agreement with the Soviet Government, and that its decision not to offer the Applicant continued employment was based entirely upon an unfettered exercise of discretion. The *Answer* claims that the Respondent believed at that time that the agreement of the Soviet Government was needed only with respect to an extension of secondment, but not with respect to continued employment on any other basis. The Respondent asserts that

> "in its third paragraph, [the letter] merely paraphrases the principles enunciated by the Tribunal at paragraph VII of *Higgins*, *op. cit.*, in denying that Applicant could

III. THE TRIBUNAL'S DECISION

A. The Questions Presented to the Tribunal by the Applicant

In his application to the Tribunal, the Applicant asked it to rule on three questions of law:

> "To adjudge and declare that no impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> To adjudge and declare that he had an expectancy of further employment.
>
> To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment." (Judgement, *supra*, p. 43).

B. The Issues as Defined by the Tribunal

The Tribunal identifies at paragraph I of its Judgement three "legal issues" in the case. They are:

> "*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;
>
> *(b)* whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads:
>
> > '*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'
>
> has been carried out;
>
> *(c)* the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship." (Judgement, para. I.)

It is immediately apparent that issues *(a)* and *(b)* correspond to the Applicant's second and third pleas, and that issue *(c)* is unrelated to the Applicant's pleas. The Tribunal found with respect to the first "issue" that the Applicant had no legal expectancy of further employment with the Respondent arising

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have any expectancy of renewal of his one-year contract *on secondment*". *Answer*, paragraph 21 (emphasis added).

But that is not what the clear words of the letter say. They say that "the Organization agreed so to limit the duration of *your United Nations service*". This wording is entirely consistent with the Applicant's assertion that the Respondent believed itself legally bound not to continue the Applicant's employment *under any circumstances* without Soviet Government approval. It is entirely consistent with the three contemporaneous public statements made by responsible Secretariat officials. It is, by sharp contrast, entirely inconsistent with the *ex post facto* version of events now relied on by the Respondent.

[2] These statements if taken in isolation could also support the Respondent's assertion that the Respondent did not, despite the unambiguous terms of the letter of 21 December 1983, feel itself legally bound not to offer continued employment to the Applicant. In that case, they would constitute evidence that the Respondent yielded to the objections of the Soviet authorities (see discussion, *infra*, at p. 175).

either from his performance while employed under a series of fixed-term contracts, or from General Assembly resolution 37/126, IV (Judgement, para. VI). With respect to the second "issue", it found that the Respondent possessed the sole discretion to determine whether or not it had given the Applicant's application "every reasonable consideration", and that it had so determined[1] (Judgement, para. XVIII). The Tribunal found that the third "issue" need not be decided, since "there was apparently no immediate problem and it seems that no request was made to the Respondent for agreeing to the Applicant waiving his privileges and immunities" (Judgement, para. XII).

In addition to ruling on two of the three issues it listed, the Tribunal also ruled on three other issues it had not listed. These were: (1) whether the Respondent improperly took into account the views of the Soviet authorities in denying the Applicant's request; (2) the effect of the Applicant's decision to seek to change his nationality on his eligibility for continued employment with the United Nations; and (3) whether the Applicant had been legally seconded to the United Nations by the Government of the USSR at the time the Respondent took his decision to reject the Applicant's request for continued employment. The Tribunal found that the Respondent had not allowed himself to be improperly influenced by the views of the Soviet Government, that the Respondent was not only permitted, but was required, to take into account the Applicant's intent to change his nationality, and that the Applicant was seconded throughout his last period of continuous service from December 1977 until December 1983.

The views of the United States with respect to all five issues addressed by the Tribunal are set out below.

All of the Tribunal's rulings in this case are of fundamental importance in defining the nature of international civil service and are directly applicable to large numbers of international civil servants. They go far beyond the narrow interests of those immediately concerned. The broader implications of the Judgement were noted by Mr. Tsering, the Representative of Bhutan to the Committee, who stated

> ". . . this case is crucial—to the Applicant, to the Respondent, and in particular for the efficient running of the United Nations Secretariat in the larger interest of the international community" (A/AC.86 XXIV/PV.5, p. 5).

The independence and integrity of the Secretariat is the keystone of the functioning of the United Nations. The need to protect the large number of officials who are seconded under fixed-term contracts from undue pressures is critical. It was in response to that need that the General Assembly adopted resolution 37/126, IV. The facts of the instant case must be viewed in light of this need, the General Assembly's response to it, and Articles 100 and 101 of the Charter. The continued viability of the United Nations in the form envisaged by Articles 100 and 101, an international organization with an independent Secretariat, as opposed to an inter-governmental coalition, is the central issue raised by the instant case.

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[1] In so finding, however, the Tribunal noted that the Respondent never expressly advised the Applicant that "every reasonable consideration" had in fact been given to the Applicant's career appointment, and fails to establish of what such "reasonable consideration" in its opinion consisted (Judgement, para. XVIII).

C. Discussion of the Tribunal's Judgement

1. THE LEGAL REASONING UNDERLYING THE TRIBUNAL'S HOLDING THAT THE APPLICANT HAD NO LEGAL EXPECTANCY OF FURTHER EMPLOYMENT WITH THE UNITED NATIONS IS FLAWED

The Tribunal's reasoning in reaching the conclusion that Applicant had no expectancy of further employment is unsound [1]. The Tribunal states that "[i]n so far as he was on secondment for the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment" (Judgement, para. XII). This sentence is a *non sequitur*, since no action taken by an employee can generate a legal expectancy in any case. The Tribunal goes on to assert:

> "If his fixed-term appointment were not based on secondment he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise." *(Ibid.)*

The Tribunal would thus appear to be holding that secondment in and of itself precludes the creation of a legal expectancy for continued employment even if the Respondent were to take actions that would otherwise create one [2]. The Tribunal gives no argument to support this view, which colours its entire judgement, and cites no authority for it. It is this view that leads the Tribunal to fail to grasp the thrust and meaning of resolution 37/126, IV, including its critical relationship to Chapter XV of the Charter, and causes the Tribunal to fail to perceive the conflicts between the Respondent's actions and Articles 100 and 101 of the Charter. There is no basis for this holding in logic, in the Charter, in the Staff Rules, or the jurisprudence of the Tribunal, and it is moreover inconsistent with the nature of secondment, as the United States shall show. The United States therefore believes that the Tribunal's legal analysis on this point is fundamentally in error.

2. THE RESPONDENT WAS OBLIGATED UNDER GENERAL ASSEMBLY RESOLUTION 37/126, IV, TO GIVE THE APPLICANT'S REQUEST "EVERY REASONABLE CONSIDERATION". IT DID NOT COMPLY WITH THIS OBLIGATION

(a) *Resolution 37/126, IV, Was Binding upon the Respondent*

Resolution 37/126, IV, was adopted while the Applicant was employed by the United Nations. The obligations placed upon the Respondent with respect to the Applicant by that resolution thus became part of the terms and conditions of his contract upon which he could rely in his dealings with the Respondent

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[1] Whether or not a case could be made out on the facts to support a finding of expectancy does not go to the issue of the Tribunal's legal reasoning.

[2] The Tribunal makes clear in this passage its belief that the critical element precluding the creation of expectancy is secondment, not the fixed-term nature of the contract. Yet the Staff Rule in question states: "The *fixed-term appointment* does not carry any expectancy of renewal . . ." (Rule 104.12 *(b)* (emphasis added).) This apparent contradiction is resolved when it is realized that although the fixed-term contract itself cannot give rise to an expectancy, actions taken or assurances given by the Respondent may give rise to expectancy without regard to the type of contract in question (***Bhattacharrya***, UNAT Judgement No. 142, para. 5).

(*I.C.J. Reports 1982*, p. 386). The General Assembly "decided" in paragraph 5 of the resolution that employees of the Secretariat having more than five years' of acceptable service under fixed-term contracts "shall" be given "every reasonable consideration" for conversion to career status. Whether or not the Applicant had a "legal expectancy", that is a legal right, that the Respondent would continue to employ him, under the terms of resolution 37/126, IV, he certainly did have a "legal expectancy" that the Respondent "shall" give his application for such employment "every reasonable consideration". The member States of the United Nations, who adopted the resolution have, moreover, a right to expect the Respondent to comply with its terms, especially when their purpose is to assure the effectiveness of a fundamental Charter provision.

(b) *The Respondent Does not Have Unfettered and Self-Judging Discretion to Determine Whether "Every Reasonable Consideration" Was Given the Applicant's Request*

The Tribunal holds that

> "it is left to the Respondent to decide how 'every reasonable consideration' for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5. In the present case, the Respondent had *sole authority to decide what constituted 'reasonable consideration'* and whether the Applicant could be given a probationary appointment." (Judgement, para. XVIII (emphasis added).)

In the view of the United States, the Respondent's discretion to determine whether it had given the Applicant's request "every reasonable consideration" cannot be both unfettered and self-judging, as the Tribunal holds. The Respondent's discretion must in every case be exercised in a manner consistent with the Charter, and the United Nations Staff Regulations and Rules. It was the task of the Tribunal to determine on the basis of the law whether that discretion had been abused.

One particularly well-expressed formulation of the standard that should be applied to determine whether the Respondent had abused its discretion is that used by the ILO Administrative Tribunal in the *Rosescu* case (ILOAT Judgment No. 431), which is referred to by Mr. Kean at paragraph 4 of his dissent; namely, whether the Respondent's claim that it gave "every reasonable consideration" to the Applicant's request

> "is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or law, disregard of essential facts, misuse of authority, or the drawing of clearly mistaken conclusions from the facts [1]".

The Tribunal in this case, by contrast, fails to apply any objective legal standard to the Respondent's conduct. It merely points to the Respondent's statement in the letter of 21 December 1983 claiming that it had "given careful consideration to the issues raised in your request for administrative review".

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[1] The concept of abuse of discretion, embodied in the standard employed by the ILOAT in *Rosescu*, is well established in the administrative law of all major legal systems. See, e.g., Wiersbowski and McCaffrey, "Judicial Control of Administrative Authorities: A New Development in Eastern Europe", *International Lawyer*, Vol. 18, No. 3, pp. 645-659.

The Tribunal infers from this unsupported assertion that the Respondent had consciously and freely exercised its discretion to decide whether the applicant had been given "every reasonable consideration for a career appointment", and finds that it had decided in the affirmative (Judgement, para. XVI). The Tribunal does not go on to test the Respondent's exercise of discretion against the *Rosescu* standard (or any standard, for that matter), but without further analysis concludes that the Respondent's decision in this regard was proper. This failure could be construed to be, in the words of Article XI of the Tribunal's Statute, ". . . a fundamental error in procedure which has occasioned a failure of justice . . .".

(c) *Under Either the Applicant's or the Respondent's Version of the Facts, the Respondent Abused Its Discretion in Deciding that It Had Given the Applicant's Request "Every Reasonable Consideration"*

No matter which party's version of the facts is used as the basis for analysis, the Respondent in this case clearly failed to meet the standard set out in *Rosescu*. If the unambiguous terms of the Respondent's letter of 21 December 1983, corroborated by the officials' statements, are accepted, one must conclude that the Respondent rejected the Applicant's request because it felt legally bound not to employ the Applicant further without the consent of the Soviet Government. Under this factual assumption, the Respondent in fact gave *no* substantive consideration to the Applicant's request. The conclusion that in this case no consideration at all constituted "every reasonable consideration" was based upon a "mistake of fact or law", since no such legal bar in fact exists, as demonstrated *infra*. The decision thus constituted an abuse of discretion under the *Rosescu* standard.

Even if one were to ignore all the Respondent's actions between 10 February 1983 and 4 January 1984, and accept, *arguendo*, the Respondent's unsupported *ex post facto* rationalization of its actions, it is equally clear that by considering the Applicant's intent to change his nationality as a factor militating against continued employment, the Respondent would have also failed to give the Applicant's request "every reasonable consideration". As the United States shall subsequently demonstrate, the definition of "every reasonable consideration" cannot include consideration of criteria barred by the Charter. Since the Respondent, under its version of the facts, admits that "the events of 10 February and thereafter" played a role in its decision (Answer, para. 24), the admitted use of a criterion barred by the Charter would have meant that its "consideration" of the Applicant's request was *ipso jure* "unreasonable", and amounted to an abuse of discretion. This is particularly so where, as here, that improper criterion, together with Soviet Government opposition, was the only apparent basis for the Respondent's refusal to consider the Applicant's request. The Respondent's decision under these circumstances would have constituted a "misuse of authority" a "breach of a formal . . . rule(s)" and a "mistake of . . . law"[1, 2].

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[1] Moreover, the Respondent's refusal to forward the Applicant's request to the Appointment and Promotion Board for its consideration could be considered a "breach of a procedural . . . rule", since under Staff Rule 104.14 it is the Board, not the personnel services, that are to "give advice on the appointment . . . of staff".

[2] Even if the Respondent had "given careful consideration to the issues raised in [the Applicant's] request for administrative review", this could not have constituted, as the Tribunal found, "every reasonable consideration" of the Applicant's application for a

3. THE TRIBUNAL'S HOLDING THAT THE RESPONDENT DID NOT "ALLOW THE WISHES OF A MEMBER STATE PREVAIL OVER THE INTERESTS OF THE UNITED NATIONS" IS IN ERROR.

The United States believes that the Tribunal has misconstrued the *Rosescu* case, and that in fact that case stands squarely for the proposition that it is impermissible for the Respondent to "allow the wishes of a member State [to] prevail over the interests of the United Nations" in reaching personnel decisions. The United States further believes that the establishment of such improper influence does not require the proof of a causal link between the opposition of a member State and the action of the Respondent.

In *Rosescu*, the interests of the IAEA were expressed in a letter to the Romanian authorities stating that the Organization intended to conclude a new five-year fixed-term contract with the Applicant. The Romanian authorities expressed disapproval of the Organization's intention to continue to employ Mr. Rosescu. In the event, the new contract was limited to a duration of eight months. The fact that the contract actually concluded was of a shorter duration that the one originally intended was viewed by the ILOAT as *ipso facto* evidence that the Organization had conformed its conduct to some extent to the wishes of a member State, notwithstanding the absence of evidence proving the existence of a causal link between the opposition of the Romanian authorities and the modification of the contract. All that was needed to be shown was that one course of action defining the Organization's interest was originally proposed, that a member State objected, and that another course of action was taken.

In the instant case, the letter written on 2 December 1983 by the Applicant's superior, indicating his desire to have the Applicant continue in the service of the United Nations, constitutes clear evidence of the interests of the organization. The statements by responsible United Nations officials (at p. 170, *supra*), confirm that the Soviet authorities had opposed the continued employment of the Applicant by the United Nations. The fact that the Respondent in the end refused to employ the Applicant further constitutes, under *Rosescu*, *ipso facto* evidence that (to the extent discretion was exercised) the Respondent had conformed its conduct, at least to some extent, to the wishes of a member State.

The burden was thus on the Respondent to show that in rejecting the Applicant's request, it was not responding to the wishes of the Soviet authorities, and that its decision was based on unrelated, and legitimate, concerns. The burden was not sustained. The Respondent merely states in a circular fashion that its decision "was legitimately motivated by the Secretary-General's perception of the interests of the organization" (Answer, para. 25). This conclusory statement is insufficient to sustain the burden imposed by *Rosescu*. Not only does the Respondent fail to sustain the burden of establishing freedom from undue influence, but the facts strongly suggest both that such pressures were applied, and that the Secretariat believed it was legally bound to heed them. The conclusion that the Respondent was reacting to the opposition of the Soviet authorities stands unrebutted.

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career appointment. The administrative review referred to pertained only to the Respondent's decision of 23 November not to consider an extension of the Applicant's *fixed-term* appointment. An assertion that "careful consideration" has been accorded a protest against denial of an application for a fixed-term appointment cannot properly be considered as evidence for the proposition that "every reasonable consideration" has been given a later application for a career appointment.

The decision of the ILOAT to require proof of the absence of impropriety is compelling as a logical and legal matter and the Tribunal is bound by the Charter and fundamental principles of justice to follow that approach. If those who believe they have been damaged by improper governmental intervention with the Secretariat were to have to prove impropriety, they would be saddled with an impossible burden. Employees cannot have access to the facts that could prove such an assertion. The Secretary-General on the contrary must have access to facts that would credibly support the conclusion that he reached his decision for reasons other than the request of a State. Indeed, if the Secretary-General did not have sufficient facts fully to justify his decision on grounds totally independent of the request of a State not to employ someone, he could have no legitimate basis for deciding not to employ him. It is this practical and logical matrix that makes the reasoning of *Rosescu* compelling as a matter of logic, law and justice [1].

4. The Tribunal Erred in Ruling that the Respondent Was Required to Take into Account the Applicant's Desire to Change His Nationality when Deciding Whether to Continue His Employment

The Tribunal interprets a statement contained in a report by the Fifth Committee to find a necessary inconsistency between a change in an employee's nationality and his eligibility for continued employment with the United Nations. The Tribunal holds that this view, which it characterizes as a "widely held belief", "must continue to provide an essential guidance in this matter" [2] (Judgement, para. XII). In the view of the United States, the Fifth Committee's statement, coming as it did in the context of a discussion of the effect nationality changes would have upon the national quota system, cannot have been intended to have the meaning the Tribunal ascribes to it. If change of nationality were to render an employee "unsuitable" for employment, the question of how to arrange the quotas to take account of his continued employment under a new nationality would never arise [3].

Even if the interpretation given by the Tribunal to the Fifth Committee's view were correct, it is beyond question that the Secretary-General may not follow any "belief", no matter how "widely held", if to do so would cause him to violate the terms of the Charter which he is sworn to uphold.

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[1] In the view of the United States, the long range interests of the organization, i.e., the interests of the membership as a whole, cannot be permitted to be subordinated to the interests and potential actions of a single member. This is not merely the logic and conclusion of *Rosescu*, but an inescapable conclusion in light of Article 2, paragraph 1, of the Charter. Under Article 2, paragraph 1, if the objections of any one State are to be accorded determinative weight, then each State must be accorded a similar capability in analogous circumstances. The disintegrative effects of such a régime on the organization and its Charter are obvious.

[2] The Tribunal here relies upon its Judgement in the *Fischman* case (UNAT Judgement No. 326), which was decided contemporaneously with the instant case and in which the two Justices who constituted the majority also participated. The extent to which *Fischman* may be relied upon as independent previous authority for the view expressed in the instant case is therefore open to serious question.

[3] In his dissent, Mr. Kean points out that this apparently categorical statement in the Fifth Committee's report was taken out of context by the Tribunal, and must be viewed with caution in the light of the subsequent discussions in that Committee (Dissent, para. 12, note *(a)*).

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In the latter connection, the United States would invite the Court's attention to the Tribunal's holding in *Estabial* (UNAT Judgement No. 310). In that case, the Secretary-General sought to deny the Applicant consideration for a transfer based on his determination that the position in question was reserved for an employee from a geographical area other than that represented by the Applicant. The Tribunal, in rejecting the Secretary-General's decision, said:

> "It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter in the interests of the service." (Judgement No. 310, para. XIV.)

If it is unlawful for the Secretary-General to alter Article 101, paragraph 3, of the Charter by making geographic diversity an additional "paramount" criterion upon which personnel decisions are to be taken, *a fortiori* it cannot be lawful for him to alter the Charter in order to take into account a so-called "widely held belief" concerning the suitability of certain employees for future employment—a "belief" that is moreover unsupported by the language of the Charter or by any reasonable interpretation of the Fifth Committee's intent.

Since the Tribunal in *Estabial* makes clear that the fulfilment of the paramount criterion laid down in Article 101 (3) is *ipso facto* "in the interests of the service", it follows that basing personnel decisions on some other criterion cannot be "in the interests of the service". The employment of a criterion such as "the events of 10 February 1983 and thereafter" by the Secretary-General in reaching a decision respecting the "appointment transfer or promotion of the staff", Regulation 4.2, thus cannot be, contrary to the Respondent's assertion, "in the interests of the Organization". The use of this criterion constitutes, rather, a violation of the standards established by Article 101, paragraph 3, and in Staff Regulation 4.2 and is thus an abuse of discretion.

5. The Tribunal Erred in Finding that a Secondment Contract Was in Effect at the Time the Respondent Considered the Applicant's Request for Continued Employment. Mr. Ustor's View that a Contract of Secondment Bars Continued Employment without the Consent of the Sending Organization Is in Error

Respondent no longer asserts that the status of Mr. Yakimetz as a seconded official rather than as a party to a simple fixed-term contract is relevant. The United States agrees that such a distinction ought not to have been relevant. Its relevance in the instant case is that at an earlier and critical stage Respondent relied on such a distinction, and that the errors in the Judgement flow in part from the failure of the Tribunal to understand why secondment is irrelevant, and in part from its erroneous view of the nature of secondment [1].

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[1] The United States believes it is nevertheless important for the Court to clarify the meaning and nature of secondment in the light of its increasing use in staffing international organizations generally and the United Nations in particular, even though this case does *not* turn on the question of whether the Applicant was in fact seconded to the United Nations during his second continuous period of service there from 27 December 1977 to 26 December 1983.

(a) *The Secondment Contract Is a Symmetrical Trilateral Agreement, Defined by Three Sets of Reciprocal Obligations*

According to the jurisprudence of the Tribunal, secondment is a contract concluded among a sending organization, a receiving organization, and an employee (*Higgins,* Judgement No. 92, para. VII). The contract of secondment may thus be likened to a triangle, with one party at each corner, and with reciprocal obligations flowing between each pair of parties along each of the three sides. Defining these obligations defines the contract of secondment.

The obligation of the *sending organization* to the receiving organization is to make the employee available to the receiving organization for the period agreed among the three parties. The obligation of the sending organization to the employee is to offer to re-employ him at the conclusion of his service with the receiving organization.

The obligation of the *employee* to the sending organization is to leave the employ of the sending organization, to enter the employ of the receiving organization and to remain there until the conclusion of the arrangement. The obligation of the employee to the receiving organization is to accept the discipline of the receiving organization and to perform whatever tasks are properly required of him pursuant to the organic law of the organization.

The obligation of the *receiving organization* to the sending organization is to employ the employee for the period agreed among the three parties. The obligation of the receiving organization to the employee is to compensate him for the work he performs and to employ him according to the organic law of the organization for the term of the contract.

(b) *A Valid Contract of Secondment Could not Have Been Concluded among the Applicant, the Respondent, and the Government of the USSR at the Beginning of the Applicant's Final Continuous Term of Service in 1977*

The Tribunal found, contrary to the Applicant's view, that a valid contract of secondment had been concluded among the Applicant, the Respondent, and the Government of the USSR in December 1977, at the beginning of the Applicant's second continuous term of service with the United Nations. This conclusion is supported only by the observation that the existence of this contract of secondment, co-terminous with the Applicant's appointment of 20 December 1977 on 26 December 1982, was proven by the fact that all three parties believed that such a contract of secondment existed (Judgement, para. III).

The United States does not find the Tribunal's reasoning in this regard to be sound. A shared belief among the purported parties that a certain legal relationship exists is not alone sufficient to create that relationship. The legal capacity to enter into the relationship in question must also be present. In this case the Government of the USSR was incapable of entering into a secondment relationship with respect to the Applicant because at the time the purported contract was concluded, the autumn of 1977, the Applicant was not employed by that Government. Immediately prior to his appointment in 1977, the Applicant had been a student of economics, not a government official. The fact that the Applicant had been employed by that Government as a teacher of physics until 1969 (Judgement, para. VII), is not relevant to the issue posed in 1977. Since the Applicant was not serving under a contract of secondment during the period 1977-1982, the purported modification of that non-existent contract to make it expire in December 1983 *vice* December 1982 was ineffective. This is true despite the fact that reference was made to it in the letter of appointment of 9 December

1982. Accordingly, the United States believes that the Applicant was not validly seconded to the United Nations by the Government of the USSR at the time the Respondent considered his application for career employment.

(c) *Even if the Applicant Had Been Employed under Secondment During His Final Fixed-Term Contract, the Waiver of His Right to Re-employment with the Sending Organization on 10 February 1983 Would Have Vitiated the Secondment*

The Tribunal, having erroneously found that a valid contract of secondment was concluded in relation to the Applicant's letter of appointment of 27 December 1977 and that this secondment was modified by agreement of the three parties to extend it until 26 December 1983, ruled that the severing of all official connections between the Applicant and the Government of the USSR during the pendency of that contract had no effect upon the secondment relationship (Judgement, para. XIII).

This holding is in error even if a valid secondment could be said to have existed as of December 1977 or December 1982. The contract of secondment necessarily obliges the sending organization to offer re-employment to the employee at the conclusion of the contract. This obligation gives rise to a right on the part of the employee to re-employment which, as with all rights, may be waived by the employee.

That waiver has the effect of relieving the sending organization of its obligation to offer re-employment. This being the only remaining obligation tying the sending organization to the employer and the receiving organization (the other three having been discharged at the commencement of the term of the contract), once it is discharged all that remains is the bilateral contract between the employee and the receiving organization, defined in this case by the letter of appointment. That contract is unaffected by cessation of the secondment relationship.

(d) *A Contract of Secondment Contains no Implicit Agreement on the Part of the Receiving Organization not to Employ the Employee Subsequent to Its Expiry without the Consent of the Sending Organization*

The question of an implicit preclusive agreement not to employ is not dealt with in the Tribunal's Judgement; it is addressed only in the statement appended to the Judgement by Mr. Ustor and in Mr. Kean's dissent. Mr. Ustor states

> "that the doctrine developed in this respect by the Tribunal—based on the very nature of the concept of secondment—precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other type of appointment without the consent of the government concerned".

Mr. Kean, on the other hand, referring to a paragraph in Annex I of the 1982 Report of the ICSC, says that

> "[f]ar from there being a generally accepted rule that in the absence of the government's consent a seconded staff member must always be refused, *in limine*, a career appointment at the end of his period of secondment, this paragraph makes it quite clear that the government's view was not to be decisive" (Dissent, para. 11).

The United States agrees with Mr. Kean, and considers that Mr. Ustor's discovery of a "doctrine developed in this respect by the Tribunal" to be without foundation. Nothing in either the *Higgins* or the *Levcik* cases, relied on by Mr. Ustor, supports this claim.

The issue in *Higgins* was whether the sending and receiving organizations could legally vary the terms of the secondment contract while it was in effect, in this case by terminating it before the previously agreed date. The Tribunal found that they could not do so without the agreement of the employee. In *Levcik* the Tribunal found that there was no valid secondment. There was in neither case any discussion of the existence or nature of any preclusive agreement inherent in the secondment contract that would require the sending organization to approve the future employment of the employee on a non-seconded basis by the receiving organization after the secondment had expired; the issue did not arise in either case, so there was no need for the Tribunal to discuss it.

Leaving aside the question of whether there exists authority in the Tribunal's jurisprudence for the "doctrine" alluded to, in the view of the United States no such "doctrine" exists. There is nothing in the secondment contract that remotely suggests the existence of an implicit obligation not to re-employ a previously seconded employee on a non-seconded basis over the objections of his government. If such an obligation were to be implied, it could deny the United Nations the future services of competent personnel at the uninhibited whim of member States. Working under the shadow of such an obligation would place United Nations personnel in a situation of divided loyalties, to the disadvantage of the Organization and contrary to the most basic assumptions underlying the concept of an international civil service. The assumptions that staff members of the United Nations are to exercise their judgment with complete independence and impartiality, and that member States are to respect and support the independence of the Secretariat, are enshrined in Articles 100 and 101 of the Charter. These assumptions form the foundation of the Secretariat as an international, rather than inter-governmental, institution. Accordingly, the existence of a doctrine so clearly at variance with these assumptions, and at variance with the symmetrical structure of secondment described *supra*, should not be implied in the absence of clear evidence.

IV. THE TRIBUNAL'S DECISION IN THE LIGHT OF THE QUESTIONS POSED TO THE COURT BY THE COMMITTEE

A. The Tribunal Failed to Exercise Jurisdiction Vested in It by not Responding to the Question Whether a Legal Impediment Existed to the Further Employment of the Applicant

1. The Court Defined in the *Fasla* Case the Standard of Review to Be Applied to Determine Whether Jurisdiction Has Been Exercised

The Court interpreted the Committee's first question in the *Fasla* case (*I.C.J. Reports 1973*, p. 166). The Court there held that

> "this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case" (*ibid.*, p. 189).

It went on to warn that

> "[t]he test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgment: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based . . ." (*ibid.*, p. 193).

Mr. Ustor's statement sheds important light on whether the Tribunal met the standard established in *Fasla*. Mr. Ustor posits two possible legal bars to the Applicant's continued employment with the United Nations: First, that under secondment, "conversion to any other type of appointment without the consent of the Government concerned" is precluded; second, that "the Applicant, in view of the circumstances in which he elected to break his ties with his country, 'could no longer claim to fulfil the conditions governing employment in the United Nations'".

In both cases, Mr. Ustor disagrees with the reasoning of the Judgement, arguing that the result, in which he concurred, should have been reached on the ground that the Applicant was legally barred, and not on the ground upon which it was reached, i.e., that the Respondent's refusal to consider the Applicant's request for a career appointment was a legitimate exercise of discretion. In the light of Mr. Ustor's statement, only two conclusions are possible with respect to each issue. Either the Tribunal in the Judgement (1) failed to address the issue entirely, or (2) considered the issue and decided that there was no legal bar, but neglected to reflect that decision explicitly in the text. The conclusion that the Tribunal found, even implicitly, that a legal bar of any kind existed is ruled out.

The United States believes that the Tribunal failed entirely to consider the issue of governmental consent for continued employment, and that it implicitly found that a change of nationality does not bar an employee from continued United Nations service.

2. The Tribunal Failed to "Address Its Mind" to the Question of Whether the Contract of Secondment Contains a Preclusive Agreement

The Tribunal's discussion of secondment, wherein the first issue of the existence of a legal bar would have arisen if it had been considered, is entirely concerned with the question of whether the Applicant had an expectancy of further employment. The question of whether the contract of secondment among the Applicant, the Respondent, and the Soviet Government contained some preclusive agreement, as suggested in the Respondent's letter of 21 December 1983 and in Mr. Ustor's statement, but rejected in Mr. Kean's dissent, is not mentioned. It is not mentioned because the Tribunal failed to "address its mind to [a] matter [. . .] on which a plea was based", i.e., the critical threshold issue of whether the Applicant's version of events (that the Respondent believed itself legally bound not to continue the Applicant's employment absent the agreement of the Soviet Government) or the Respondent's *ex post facto* reconstruction was to be accepted as the factual basis for the Judgement. The Judgement appears superficially to be consistent with the Respondent's reconstruction, but the Tribunal at no point actually *finds* that the Respondent was correct, or even implies that it perceived that a difference of view existed between the Applicant and the Respondent. The United States believes this omission to consider an issue critical to the case was a failure of the Tribunal to "address its mind to the matter [. . .] on which a plea was based", a failure the Court has stated defines "failure to exercise jurisdiction" (*I.C.J. Reports 1973*, p. 193).

In the light of the foregoing, the United States asks the Court to advise the United Nations that the Tribunal failed to exercise jurisdiction vested in it by not answering the question whether the consent of the Soviet Government was required for the further employment of the Applicant on a non-seconded basis, and that, as a matter of law, no such consent was required.

3. THE TRIBUNAL FOUND, ALBEIT IMPLICITLY, THAT AN EMPLOYEE'S CHANGE OF NATIONALITY DOES NOT CONSTITUTE A LEGAL BAR TO HIS CONTINUED EMPLOYMENT BY THE UNITED NATIONS

The Tribunal did, by contrast, discuss extensively the facts (which in any case were uncontested) pertaining to the Applicant's decision to seek to change his nationality. Yet at no point does the Tribunal conclude that the Applicant's decision constituted a legal bar to continued employment, as Mr. Ustor wishes it had. The Tribunal instead found that the Respondent had the discretion to continue to employ the Applicant despite his intent to change nationality [1], and that the Respondent's decision not to do so in the light of the Applicant's intent was a proper exercise of that discretion. This finding necessarily presupposes a determination that the decision by the Applicant to seek to change his nationality did not constitute an impenetrable legal bar to continued employment. Accordingly, the United States believes that, with respect to this issue, the Tribunal found implicitly that no legal bar to continued employment is raised by a decision to seek a change in nationality. (In any event, as shown *supra*, at p. 177, to raise a change of nationality to the status of a paramount criterion in making personnel decisions is contrary to the Charter.)

In the interests of clarifying the law, the United States asks the Court to confirm explicitly the implicit finding of the Tribunal that a decision by an employee to seek to change his nationality does not constitute a legal bar to continued employment with the United Nations.

B. The Tribunal Erred on Questions of Law relating to the Charter of the United Nations

1. THE TRIBUNAL'S FINDING THAT THE RESPONDENT HAD NOT ALLOWED THE WISHES OF A MEMBER STATE TO INFLUENCE ITS DECISION WITH RESPECT TO THE APPLICANT WAS BASED UPON A MISINTERPRETATION OF ARTICLE 100, PARAGRAPHS 1 AND 3, OF THE CHARTER

The United States believes that the Tribunal's finding that the Respondent had not "in any manner let the wishes of a member State prevail over the interests of the United Nations" (Judgement, para. XIX), to be erroneous. Under the analysis employed in the *Rosescu* case, applied *mutatis mutandis* to the facts of this case, it is clear that the established United Nations interest in the continued employment of the Applicant was improperly overriden by consideration of a member State's opposition. For the Respondent to have taken that opposition into consideration in rejecting Applicant's request for continued employment (assuming, as apparently did the Tribunal, that he freely exercised discretion in the matter) the Respondent would have acted in a manner incompatible with Article 100, paragraphs 1 and 3. The United States asks the Court so to advise the United Nations.

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[1] The United States would observe that this finding appears flatly inconsistent with the Tribunal's previous reading of the Fifth Committee statement, discussed *supra* at page 177.

2. THE TRIBUNAL'S FINDING THAT THE RESPONDENT WAS JUSTIFIED IN TAKING INTO ACCOUNT THE APPLICANT'S DESIRE TO CHANGE HIS NATIONALITY IN DECIDING WHETHER TO OFFER HIM CONTINUED EMPLOYMENT WAS BASED UPON A MISINTERPRETATION OF ARTICLE 101, PARAGRAPH 3, OF THE CHARTER

The Tribunal holds that the Secretary-General is required to consider a decision on the part of an employee to seek to change his nationality as a negative factor in deciding whether to extend that employee's employment with the United Nations (Judgement, para. XII). The United States believe that the Secretary-General is not only not required to consider this factor, but is in fact legally precluded from doing so. As noted *supra*, the reasoning employed by the Tribunal in the *Estabial* case applies with equal force to the present case. The considerations of "efficiency, competence and integrity" are, according to *Estabial* and in the view of the United States, "paramount", as indeed Article 101, paragraph 3, of the Charter expressly provides. In the context of this case, where there is no question of competition for a position among candidates from various geographic regions who all meet the "paramount" criteria, the criteria are, in addition, exclusive. Moreover, the so-called "widely held belief" that change of nationality disables an international civil servant from continued service is in our view based upon a misreading of the record of the Fifth Committee's discussion of the issue. That "belief" is in fact simply an expression of the politically motivated preferences of a small number of States, totally devoid of legal foundation, which is entitled to no weight when matched against the clearly contrary words of the Charter. The United States asks the Court so to advise the United Nations.

WRITTEN COMMENTS

OBSERVATIONS ÉCRITES

1. COMMENTS ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS SUBMITTED PURSUANT TO ARTICLE 66, PARAGRAPH 4, OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

INTRODUCTION

1. The present proceeding is designed to enable the Court to respond, in the form of an advisory opinion, to the two specific questions addressed to it by the Committee on Applications for Review of Administrative Tribunal Judgements (the Committee) within the context of Article 11 of the Statute of the United Nations Administrative Tribunal (doc. No. 16).

2. The views of the Secretary-General were submitted to the Court in his Written Statement of 26 February 1985 and these views are maintained. However, as this case concerns a dispute between the Applicant and the Secretary-General as his former employer, it was considered that it might be useful for the Court to receive the comments of the Secretary-General on the principal arguments put forward in the Written Statement submitted to the Court by the Applicant.

> *Question 1: In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?*

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

3. The Applicant argues that the Tribunal failed to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to his further employment with the United Nations because "Implicit in [the Tribunal's] judicial character is that it must pronounce independently on the legal issues submitted to it" (Applicant's Written Statement, para. 57). The Applicant, moreover, urges that a reply to the question he posed to the Tribunal "was a necessary preliminary to deciding whether the terms and conditions of his contract had been violated, and whether remedy was due" (*ibid.*, para. 58).

4. The Applicant, relying on press statements made by United Nations officials and a letter dated 21 December 1983 written to him by Mr. Louis-Pascal Nègre, Assistant Secretary-General for Personnel Services, contends that the Tribunal failed to exercise the jurisdiction vested in it by concluding wrongly that the Secretary-General gave the Applicant "every reasonable consideration" for a career appointment to which he was entitled pursuant to General Assembly resolution 37/126 (*ibid.*, paras. 58 to 62 and 72 to 75).

5. The Applicant submits that his service record was so good and so fitted the needs of the service—evidenced by a departmental request that he be offered another contract—that a proper exercise of discretion mandated the grant of a further appointment (*ibid.*, paras. 60 and 77). Relying on *In re Rosescu* (doc.

No. 34), he argues that the Tribunal failed to exercise jurisdiction because it did not conclude that the Secretary-General improperly deferred to the will of a member State in not offering the Applicant a new appointment (Applicant's Written Statement, paras. 68-71).

6. The Applicant also suggests that the Tribunal failed to exercise its jurisdiction because it failed to conclude that resolution 37/126 gave him a legal expectancy of a further appointment because the resolution "had made obsolete the Tribunal's previous jurisprudence on expectancy, except for periods of four years or less under fixed-term contracts" (*ibid.*, para. 72).

COMMENTS OF THE SECRETARY-GENERAL

7. With respect to the argument that the Tribunal failed to exercise its jurisdiction by not deciding the question of the existence of a legal impediment against the re-employment of the Applicant, it must be repeated that, as the Tribunal concluded, the Applicant was given "every reasonable consideration" before the Secretary-General decided against giving him a new appointment. Under these circumstances, there was no need for the Tribunal, in logic or in law, to determine whether there would have been a legal impediment to the further employment of the Applicant had the Secretary-General chosen to offer him a career appointment (Written Statement by the Secretary-General, paras. 61-79). The fact that the Applicant and the Tribunal differ on whether the Secretary-General, in arriving at the conclusion not to offer a further appointment, had exercised his discretion in a proper way, does not imply a failure by the Tribunal to exercise its jurisdiction.

8. The fact that the Applicant and the Tribunal drew different conclusions from the press statements and Mr. Nègre's letter does not constitute a failure by the Tribunal to exercise its jurisdiction. Indeed, the Tribunal clearly exercised its jurisdiction in holding that the Applicant had received "every reasonable consideration" for a career appointment (see Written Statement by Secretary-General, paras. 74-79). Moreover, the Tribunal's conclusion that resolution 37/126, rather than giving Applicant a legal expectancy or right to such an appointment, required that he be given "every reasonable consideration" for a career appointment. This accords with the plain meaning of the resolution, which did not intend to give a legal expectancy or right to further employment and consequently make "obsolete" the Tribunal's prior jurisprudence on expectancy and thereby take away the discretion of the Secretary-General whether to grant a staff member with five years service a permanent appointment.

9. The terms of resolution 37/126 clearly indicate that staff members, upon completion of five years of continuing good service on fixed-term appointment, have a right to be considered for a career appointment, which right did not exist prior to the adoption of the resolution. As the Tribunal concluded that resolution 37/126 had been properly applied, it follows that the Applicant's reliance on *In re Rosescu* is misplaced (see further para. 16 below). A right to *every reasonable consideration* for a career appointment is not equivalent to a *legal expectancy or right* to further employment that would be violated by a failure to grant a new contract. The Applicant's service record, which was not in dispute, does not change the right to be considered for a career appointment into a right to receive such an appointment.

Question 2: Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?

10. The Applicant argues that the Judgement of the Tribunal offended five areas of the Charter which, in his Written Statement, were characterized as follows: *(a)* the principle of merit; *(b)* the principle of neutrality; *(c)* the principle of equality; *(d)* administrative principles; and *(e)* the career concept of the international civil service. For reasons of convenience, in the paragraphs that follow, the Applicant's headings, supplemented by a reference to the relevant Charter articles, will be used.

A. The Principle of Merit (Article 101, Paragraph 3)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

11. The Applicant argues that the Tribunal's Judgement violates the principle of merit in Article 101, paragraph 3, of the Charter because it does not discuss the excellent performance of the Applicant while in United Nations service (Applicant's Written Statement, paras. 86 to 87 and 99).

12. The Applicant also argues that the majority Judgement, and more particularly the concurring statement, appears to raise, as a new "paramount" consideration, the Applicant's refusal to obey orders from his Government regarding his United Nations employment, and his consequent election "to break his ties with his country", which allegedly was considered as disabling him from consideration for a career appointment (*ibid.*, para. 88). The Applicant reaches this conclusion because the majority Judgement cited a passage of a 1953 Fifth Committee report, which stated that "International officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations" (Doc. No. 9, p. 52, *supra*, para. XII). The Applicant submits that the Tribunal's adoption of this view—which was not argued by the parties—fails to take account of the principle of merit in the Charter (Applicant's Written Statement, paras. 89-99).

COMMENTS OF THE SECRETARY-GENERAL

13. The fallacy in the argument that the Tribunal did not consider Applicant's performance is that it fails to recognize that the quality of the Applicant's performance was never in question, so it is not surprising that his performance was not discussed in the Judgement; it is, however, amply described in the Tribunal's account of the facts (Tribunal's Judgement, pp. 46-49, *supra*; doc. No. 9).

14. In so far as the Applicant's stated intention to change his nationality is concerned, the Tribunal's Judgement did not decide this case on the basis of the 1953 Fifth Committee Report; indeed, the Tribunal specifically stated that the matters considered by the Fifth Committee were not in issue since legislation was being introduced in the United States Congress to avoid the obstacles that would otherwise be caused by Applicant's acquisition of permanent residence status in the United States (Tribunal's Judgement, p. 52, *supra*, para. XII; doc. No. 9). In effect, the Applicant is arguing that the Secretary-General cannot even consider a change of nationality or the way by which this change is effected. The Secretary-General has indicated (doc. No. 21, pp. 11-12, para. 24) that he had taken account of all the circumstances; these obviously included the Applicant's proposed change of nationality. It is submitted that, as chief administrative officer of the United Nations, the Secretary-General has to exer-

cise his discretion and to take each decision individually and separately, in light of all the relevant circumstances, in the interest of the Organization. The Tribunal's finding that he had done so therefore does not constitute an error of law in respect of the Charter.

B. The Principle of Neutrality (Article 100)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

15. The Applicant argues that the Tribunal's Judgement violates Article 100, paragraph 1, of the Charter in that it did not find improper *(a)* the Applicant's exclusion from the Headquarters building; *(b)* the Soviet Government's expectation that he would leave for Moscow and that the Government would nominate another official to take his place; and *(c)* the view expressed by a number of senior United Nations officials that the renewal of the Applicant's contract of employment would require the consent of all parties to the contract of secondment (Applicant's Written Statement, para. 108). The Applicant also relies on *In re Rosescu* (doc. No. 34) to support the argument that Article 100, paragraph 1, of the Charter precludes the Secretary-General from taking into account the views of the Soviet Government (Applicant's Written Statement, paras. 68-71). These arguments are also submitted in the context of the Applicant's section on "Administrative Principles of the Charter" (*ibid.*, para. 130) (see subsection *(d)* below).

COMMENTS OF THE SECRETARY-GENERAL

16. The Respondent submits that the Applicant's reliance on *In re Rosescu* is misplaced. In that case, the Administrative Tribunal of the International Labour Organisation found that the IAEA Director General had changed a decision which he had already taken; it was also found that the change of the decision was not in the interests of the Agency, but was taken so as to comply with the wishes of a member State (ILOAT Judgment No. 431, para. 7; doc. No. 34). This is not the case here. The Tribunal concluded that the decision not to offer a new contract to the Applicant was properly taken in the interests of the Organization after consideration of all the circumstances, including representations to diverse effect from member States (doc. No. 9, pp. 54-55, *supra*, paras. XVIII-XX). Indeed, if the results of the exercise of discretion are considered in isolation, no matter what decision was taken, it would have had to be in accord with the views of one of those member States.

17. The Secretary-General's decision not to permit the Applicant, the centre of a controversy between two member States, to enter the Headquarters buildings, was an administrative decision taken in the light of all the circumstances of the case and in order to avoid potentially disruptive consequences for the functioning of the Secretariat. It cannot seriously be contended that such a decision violated Article 100, paragraph 1, of the Charter. It was, moreover, not the subject of a plea addressed to the Tribunal, and the latter was, therefore, not called upon to deal with it. (Applicant's Statement of Facts and Arguments submitted to the Tribunal, Pleas; doc. No. 19.)

18. The Applicant also argues that the Tribunal erred in respect of the Article by not finding it improper for the Soviet Government to plan to replace the Applicant upon his return to Moscow. This argument disregards the fact that the Statute of the Tribunal does not, of course, permit it to adjudge the actions or intentions of States. The Tribunal's Judgement could therefore only be an

adjudication of a dispute between the Applicant and the Secretary-General as his employer.

19. The Applicant's criticisms of the views of certain senior officials that extension of his contract of employment required, since it was a secondment contract, the consent of all parties to it, overlooks that the Tribunal's Judgement (doc. No. 9, pp. 54-55, *supra*, paras. XVIII-XX) accepted the Respondent's submission to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case" (Respondent's Answer to Tribunal, para. 24; doc. No. 21). Such a finding of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter. That finding, however, resolved the only issue for adjudication between the parties, that is, whether the Applicant actually received every reasonable consideration for a career appointment (see Written Statement by Secretary-General, para. 105).

C. The Principle of Equality (Article 2, Paragraph 1, and Article 8)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

20. The Applicant argues that Article 2, paragraph 1, of the Charter prevents a member State from seeking special treatment for its nationals and that Article 8 prevents restrictions being placed on persons from participating under conditions of equality in any organ of the United Nations and that the Tribunal erred in law by not finding that the Secretary-General's decision to prohibit the Applicant from entering the Headquarters building violated the Charter (Applicant's Written Statement, paras. 112-120).

COMMENTS OF THE SECRETARY-GENERAL

21. The Tribunal's Judgement, of course, had nothing to do with Article 2, paragraph 1, of the Charter, but concerned the application of resolution 37/126 to the Applicant (see Written Statement by Secretary-General, paras. 124-127). Indeed, the Applicant acknowledges that the General Assembly itself has recognized that some member States require their nationals to accept fixed-term appointments by permitting, in its resolution 35/210,

> "replacement by candidates of the same nationality . . . in respect of posts held by staff members on fixed-term contracts . . . to ensure that the representation of member States whose nationals serve primarily on fixed-term contracts is not adversely affected" (Applicant's Written Statement, para. 115).

22. Article 8 of the Charter solely prohibits gender-based discrimination and cannot reasonably be extended to cover any of the matters here at issue, which certainly had no relation to the Applicant's sex.

D. Administrative Principles of the Charter (Article 97 and Article 101, Paragraph 1)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

23. The Applicant argues that the Tribunal violated Article 101, paragraph 1, of the Charter by concluding that the Secretary-General gave every reasonable consideration to the Applicant for a career appointment pursuant to resolu-

tion 37/126, since the contemporary evidence made it clear that the Secretary-General gave no such consideration because he was under the mistaken impression that granting Applicant a career appointment would have required the consent of the Soviet authorities (Applicant's Written Statement, paras. 121-131). The Applicant argues that, in reality, the Secretary-General was merely carrying out the instructions of a member State (*ibid.*, para. 130).

COMMENTS OF THE SECRETARY-GENERAL

24. As was pointed out in paragraph 16 above, the circumstances under which the Secretary-General had to exercise his discretion were such that, if the result of the exercise of his discretion is considered in isolation, no matter what decision he took, that decision would necessarily have been in accord with the views of one of the member States which had made representations to him. The issue, therefore, is not the substance of the actual discretionary decision, but that the decision had been arrived at after every reasonable consideration, having in mind the interests of the Organization. As indicated, the Secretary-General has submitted to the Tribunal, to the Committee and to this Court that he did consider the Applicant for a career appointment and the Tribunal found that the Applicant received "every reasonable consideration" for such an appointment. This conclusion of fact does not involve a question of law, let alone a question of law relating to provisions of the Charter (Written Statement by Secretary-General, para. 97).

E. The Career Concept (Chapter XV of the Charter)

SUMMARY OF THE PRINCIPAL CONTENTIONS OF THE APPLICANT

25. The Applicant argues that Chapter XV of the Charter envisages a career service and that the desire to give primacy to a career service led to the adoption of resolution 37/126, which was clearly intended to apply also to seconded staff (Applicant's Written Statement, paras. 132-144). The Applicant submits that the Tribunal's Judgement defeats

> "the very purpose which the ICSC [International Civil Service Commission] and the General Assembly intended to promote: the reaffirmation of the primacy of the career service, open to all, on the basis of merit",

and that the conclusions of the Judgement are alien to the spirit of Chapter XV of the Charter (*ibid.*, paras. 148-149).

COMMENTS OF THE SECRETARY-GENERAL

26. In reply to this argument, it must be repeated that the Secretary-General has submitted to the Tribunal, to the Committee and to this Court that he did consider the Applicant for a career appointment (see para. 24 above). Further, it must be repeated that the situation is different from the *Rosescu* case and that the Tribunal found that the decision in the present case was properly taken in the interests of the Organization after consideration of all circumstances, including representations to diverse effect from member States (see para. 16 above). The Tribunal also found that resolution 37/126 was applied. Under these circumstances—and quite apart from the fact that the Judgement is directed to the question of an alleged violation of Applicant's rights flowing from his earlier employment and not to an examination of the concepts underly-

ing Chapter XV in general—it cannot be maintained that the Tribunal's Judgement constitutes an error of law in respect of Chapter XV of the Charter. It is emphasized that the principle of an independent civil service is applied by the Secretary-General irrespective of the type of appointment held by a staff member.

CONCLUSION

27. The Secretary-General considered the Applicant for a new appointment but decided that it would not be in the interests of the Organization to offer him a career appointment at that time. That decision did not violate the Applicant's contract or terms of employment and the Tribunal exercised its jurisdiction and did not commit an error of law concerning the Charter in so concluding.

(Signed) Carl-August FLEISCHHAUER,

The Legal Counsel
of the United Nations.

26 June 1985.

COMMENTS OF THE APPLICANT MR. VLADIMIR YAKIMETZ ON THE WRITTEN STATEMENTS SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE

The Applicant's written statement to the Court, dated 22 February 1985, sets out his views on the issues of law and of principle in which Judgement No. 333 was defective as it applied to him. All Tribunal judgements, however, affect not only the individual staff member who is the Applicant, but also all present and future staff members in the United Nations system and other international organizations influenced by the development of international institutional law. The Applicant submitted, as Annex A to his written statement, a statement of the United Nations Staff Union issued on 20 April 1984, supporting his request for an advisory opinion from the International Court of Justice. Since that date the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations system, and the Federation of International Civil Servants, concerned at the implications of Judgement No. 333 for all the 55,000 staff members of the common system that they represent between them, have requested an independent legal analysis of the issues of law and principle posed by the Judgement. This analysis, by Professor Alain Pellet, of the University of Paris, is attached as Annex B to these Comments, which are submitted in response to the invitation issued by the Court on 5 March 1985.

I. PRELIMINARY OBSERVATIONS OF THE APPLICANT

1. Only two Statements were submitted in support of the Tribunal's decision in Judgement No. 333; one by the Union of Soviet Socialist Republics and the other by the Secretary-General of the United Nations (the Respondent). The two Statements differ fundamentally in their understanding of the Tribunal's jurisdiction and in their interpretation of the disputed decision.

2. The USSR Statement, citing Article 2, paragraph 3, of the Tribunal Statute, givens the Tribunal almost limitless latitude in defining the scope of its own jurisdiction, which, it says, the Tribunal "must itself determine in every specific instance". The Respondent, on the other hand, maintains that under Article 2, paragraph 1, jurisdiction is limited to "determining whether contracts or terms of appointment have been observed" (para. 49).

3. The USSR Statement finds that the Judgement did answer the Applicant's question "concerning the existence of legal impediments to his further employment in the United Nations". In contrast the Respondent says that the Tribunal did *not* answer the question, because it "does not have jurisdiction to do so" (para. 57).

4. The USSR Statement says that the Tribunal set forth at least two (and possibly three) specific legal impediments to the Applicant's further United Nations employment. ". . . The absence of *(a)* trilateral agreement (between the Defendant, the USSR Government, and the Applicant) constitutes a legal impediment to the extension of Applicant's fixed-term contract." The Applicant's decision to "require *(sic)* permanent residence status" in the United States constitutes a legal impediment to "further employment in the United Nations on the basis of concluding with him a separate new contract". The Statement

also says that conversion to a permanent contract is "regulated by Rule 104.12 *(b)* of the Staff Rules", to which the "Applicant's attention was specifically drawn". The Statement twice refers to this Rule in the context of legal impediments.

The Respondent, on the other hand, says that the question of whether a legal impediment existed was "not at issue between the parties", the Respondent having conceded that it was "within (his) authority and discretion to re-appoint the Applicant after the expiry of his contract" (para. 58).

5. The USSR Statement maintains that the Tribunal supported the Secretary-General's belief that a staff member who had served on secondment "*could not* be appointed on a probation basis for the purpose of subsequently offering him a contract on the basis of a career appointment" (emphasis added). The Respondent, on the other hand, says that "the Tribunal did not find that there were restrictions on the eligibility of the Applicant to be considered for a career appointment" (para. 122).

6. The USSR Statement appears to see the decision of the Applicant to seek permanent residence status as a "juridical" issue in which the Tribunal "followed . . . its previous practice, in particular . . . its Judgement No. 325 *(Fishman)*" *(sic)*—a Judgement in which the Tribunal upheld the Secretary-General's refusal to waive the privileges and immunities of a career staff member who wished to apply for permanent residence. The Respondent, on the other hand, says that the Tribunal "made it clear that these matters (i.e., the difficulties for the United Nations if a staff member on a G-IV visa takes steps to change his nationality) were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems . . . and the Respondent does not dispute this" (para. 114).

7. The USSR Statement says that the Tribunal concluded "that in this specific instance only the Secretary-General is empowered to decide what is the meaning of the phrase 'every reasonable consideration'"; and that he "clearly determined" that reasonable consideration was not in this instance required by resolution 37/126 because of the secondment provision in the Applicant's final contract. The Respondent, on the other hand, says that "the Tribunal held that the Applicant was entitled to the benefit of that resolution and concluded that this consideration had, in fact, been given" (para. 74).

8. Thus, in point after point, the two statements wishing to uphold the Tribunal Judgement negate each other. This mutually self-cancelling quality of their arguments as to what the Tribunal could actually have decided can only serve to corroborate the Applicant's contention that in fact the Tribunal failed to exercise its jurisdiction.

II. THE FIRST QUESTION ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS: DID THE TRIBUNAL FAIL TO EXERCISE THE JURISDICTION VESTED IN IT?

9. The Respondent argues that the question of whether a legal impediment existed to the further employment of the Applicant in the United Nations after the expiry of his contract on 26 December 1983 "was not in issue between the parties", because the Respondent, in his Answer to the Tribunal, had conceded that no such impediment existed[1] (para. 58).

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[1] No jurisdictional inhibition deterred the Tribunal from examining other matters that were not at issue between the parties. Neither the Applicant, nor the Respondent, nor the

10. The *ex post facto* concession by the Respondent that no legal impediment existed did not erase the contemporaneous statements by high officials of the Respondent, and by the Assistant Secretary-General for Personnel Services in the name of the Respondent, that he was "not in a position" to treat the Applicant like any other staff member because of specific legal impediments: a supposed agreement by the United Nations "to limit the duration of your United Nations service", and the requirement of "involvement of all the parties originally concerned". Nor did the *ex post facto* concession by the Respondent revise the administrative decision, based on this recital of supposed impediments, not to consider the Applicant for a career appointment. The Tribunal, either consciously or inadvertently, failed to draw any conclusions from the Respondent's later admission that the reasons given by Mr. Nègre were specious. It searched instead for other impediments, such as the proposed change of residence status, to justify the contested action.

11. The Respondent argues, secondly, that the question of whether or not a legal impediment existed was an "abstract" one, in which the Tribunal "does not have jurisdiction to answer or advise". The Tribunal does not have to answer abstract questions just because asked; but must solve general legal questions if necessary for the resolution of a concrete question. The supposed impediments arose, in the words of the concurring statement, from "the very nature of the terms of secondment". The interpretation of contracts, terms of appointment, and special conditions therein, is very much within the competence and jurisdiction of the Tribunal, whose earlier definition of the concept of secondment in *Higgins* and *Levcik* was relied on by both parties and all members of the Tribunal. It has never been a requirement of the Tribunal that every plea contain a specific allegation of non-observance. Indeed the Tribunal's own reformulation of the "legal issues" contains one that is not only abstract but also quite unrelated to the substance of the case, i.e., 1 *(c)* "The consequences of the application of United Nations rules and regulations to the United States law on resident status and citizenship".

12. The Respondent's third argument—that the question of whether or not a legal impediment existed was not relevant to the Tribunal's adjudication—was answered comprehensively in the Written Statement of the Government of Italy, which points out that the resolution of this question must logically precede any examination of the other two questions listed. If further employment was legally barred, the Applicant could have no expectancy of renewal, and any consideration, reasonable or otherwise, for a career appointment would be utterly redundant. On the other hand, if the Tribunal found that Respondent's disclaimer,

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Government of the USSR had sought a further secondment. Yet the Judgement and both the Written Statements supporting it deal explicitly with this question. The Respondent characterizes as

> "the real issue between the parties—and that upon which the Tribunal adjudicated . . . whether or not the Applicant's rights were violated by the decision of the Respondent not to grant him a further appointment after 26 December 1983, be it a fixed-term appointment on secondment . . ." (para. 50).

Similarly the Applicant's decision to seek permanent residence status was not an issue between the parties and was raised by neither. Yet the Tribunal listed it as one of the three legal issues on which it must pronounce judgement (para. 1 *(c)*), and it formed a conclusive part in the concurring statement's reasoning.

(however contradicted by the facts of the case) was to be accepted, then it was *ipso facto* led into the concomitant inquiry whether—absent any impediment—the Respondent was not obliged to give the reasonable consideration to a career appointment prescribed by the General Assembly.

13. The Respondent postulated that two pre-conditions must be met before the Tribunal need make any inquiry into the existence or otherwise of a legal impediment: a finding of expectancy, *and* a finding that "reasonable consideration" for a career appointment had been denied (para. 61). This assumes that the application of General Assembly resolution 37/126, section IV, paragraph 5, was conditional on an expectancy of renewal. The Statement of the USSR goes even further, interpreting the Judgement as finding an absence of expectancy to be itself a legal impediment to conversion of a fixed-term to any other kind of appointment. Expectancy, as the dissenting opinion points out, is in no way a prerequisite to a career appointment. To require proof of expectancy would be to place an impossible burden on a fixed-term staff member. It would also deny all meaning to resolution 37/126, and thwart the purpose of the General Assembly.

14. The Applicant has no dispute with the Tribunal's conclusion that he had no expectancy of a renewal of his fixed-term appointment on secondment, a status which he did not seek, nor could the Secretary-General bestow. But there is no indication in the Judgement itself that the Tribunal did in fact, as the Respondent claims, "examine all the circumstances of the case" and conclude that "no circumstances existed to create a legal expectancy of future employment" (para. 70). Rather, the Tribunal found such an examination to be unnecessary, on the ground that secondment excluded the Applicant from its previous jurisprudence on expectancy[1]:

> "In so far as he was on secondment from the USSR Government, none of the actions he took could bring about legal expectancy of renewal of his appointment. *If his fixed-term appointment were not based on secondment* he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, *but such a situation did not arise*." (Para. XII.) (Emphasis added.)

In its previous jurisprudence a finding of expectancy arose not from the actions of the Applicant, but from those of the Respondent or his agents, creating a subjective expectation of further employment, based on such factors as the nature of the duties, the intention of the department in offering the contract, the written assurances of superior officers. In the present case, however, the circumstances examined by the Tribunal in its discussion of expectancy (paras. II to XII) were not the actions of the Respondent or his agents, but rather those of the Applicant in relation to the USSR Government.

15. The Applicant's expectancy for further employment did not rest, as in the cases cited by the Tribunal, on "correspondence and surrounding facts and circumstances", but rather on the much less ambiguous—indeed statutory—provisions of General Assembly resolution 37/126, paragraph 5, section IV, which formed part of his terms of appointment. Anyone with five years continuous good service has an objective expectancy of consideration, and unless

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[1] Judgement No. 142, *Bhattacharyya*, notes without further comment that Mr. Bhattacharyya was on secondment from the Indian Government. This fact formed no part of the Tribunal's examinations of Mr. Bhattacharyya's expectancy of renewal.

legally barred, anyone with a comparable service record, occupying a post which required a long-term commitment, and enjoying the strong recommendations of his department would unquestionably have been favourably considered. The Respondent concedes that the Applicant was entitled to the benefit of this resolution, but seeks to shield from the scrutiny of the Court the central legal issue of the case: whether the Applicant was illegally denied his right to reasonable consideration for a career appointment. The Respondent claims that the Tribunal made a finding of fact that this consideration was given.

16. No such finding of fact is detectable in the Judgement. On the issue of consideration there is no majority view. The concurring statement said that reasonable consideration was not required. The dissenting opinion found that reasonable consideration had been denied. The Judgement found that "the Respondent" had the sole authority to decide what constituted "reasonable consideration" . . . and that "he apparently decided . . . that the Applicant could not be given a probationary appointment". The only evidence supporting this finding, according to the Respondent, was his own statement in his Answer to the Tribunal that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances of the case" (para. 97 of the Secretary-General's Statement)—contradicting the contemporaneous assertion by Mr. Nègre that the Secretary-General was "not in a position" to agree to his request for reasonable consideration. The Tribunal Judgement thus gives the Secretary-General "unfettered and self-judging discretion", as the Statement of the United States point out, to determine the criteria for reasonable consideration, and accepts his word that it was given, without asking what those criteria were. The Respondent's Statement implies that something is a "fact" simply because he said it was so. The acceptance of such a standard would eliminate the need for any independent legal authority at all. Previous Tribunals have demanded more. Discretionary power "cannot be exercised for reasons not clearly specified" (ILOAT Judgment No. 13, *In re McIntire*); ". . . The exercise of a power which is in principle discretionary requires the Tribunal to test the validity of the explanations . . ." (ILOAT Judgment No. 27, *In re Mauch*); "While it is not for the Tribunal to substitute its judgement for that of the Secretary-General with respect to the adequacy of the grounds for termination stated, it is for the Tribunal to ascertain that an affirmative finding of cause which constitutes reasonable grounds for termination has been made, and that due process has been accorded in arriving at such an affirmative finding" (UNAT Judgement No. 4, *Howrani*). Under the Respondent's interpretation, the Tribunal demanded no clear specification of reasons, did not ascertain the reasonableness of the grounds and made no attempt to test the validity of the explanations given to it, or even to compare them with the explanations previously given to the Applicant.

17. "The mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough; it must in fact have applied them to the determination of the issue" (*I.C.J. Reports 1973*, at p. 190). The Respondent's Statement concedes that no inquiry was made as to the existence or otherwise of a legal impediment to further employment. But even as to the two "preconditions" for such an inquiry, set by the Respondent himself, the Statement fails to show that the Tribunal "applied its mind" or examined the "substance of the matter and not merely the form". In a material issue in the case, therefore, the Tribunal abdicated its powers, and failed to exercise the jurisdiction vested in it.

III. THE SECOND QUESTION ADDRESSED TO THE COURT BY THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS: DID THE TRIBUNAL ERR ON QUESTIONS OF LAW RELATING TO PROVISIONS OF THE CHARTER?

1. Article 101, Paragraph 1, of the United Nations Charter

18. General Assembly resolution 37/126, section IV, paragraph 5, confers a right on all fixed-term staff members who have rendered five years of continuing good service. The same resolution places an obligation upon the Secretary-General which, under Article 101.1, he is bound to fulfil. Staff Rule 104.12 *(b)* includes "persons temporarily seconded by national governments or institutions" in its provisions on fixed-term appointments. The Applicant did not assert a right to a career appointment, recognizing that the power of appointment remains subject to the discretion of the Secretary-General. He did assert a right to "every reasonable consideration", such consideration having been explicitly denied him in the name of the Secretary-General on 21 December 1983. The Respondent asserts that the Tribunal made a finding of fact that consideration had been given, and that a finding of fact is not reviewable as a question of law. The Applicant submits that no such finding of fact was made (and the USSR Statement implicitly supports this submission). Even if it were, whether or not such consideration was "reasonable" is a legal determination and therefore reviewable.

19. The Tribunal did not make a finding of fact that consideration was given: it made an "inference" (para. XVI). Indeed it expressed its "dissatisfaction with the failure of the Respondent" to make a record on which a finding of fact could be made (para. XX), but draws no consequence from this. Nor did it make a finding of fact that such consideration was "reasonable". It said that the Respondent had "sole authority" to decide what was reasonable, and he "apparently decided" that it was (para. XVIII). The Tribunal made no attempt to apply its own or any other legal standard of reasonableness, nor to set any limits on the Secretary-General's discretion, limits which it had itself articulated in the past (e.g., Judgement No. 54, *Mauch*) and which the Court recognized in *Fasla* as a fundamental part of the Tribunal's role (*I.C.J. Reports 1973*, at p. 205). The Tribunal's Judgement, if allowed to stand, permits the Respondent to act as though General Assembly resolution 37/126, section IV, paragraph 5, had never been passed. Indeed it endows him with even greater discretionary powers than he had before the resolution, when the normal mechanisms and procedures for appointment applied. Under this Judgement, the Respondent has "sole authority" to set standards: he need keep no records, prepare no comparative evaluation, give no reasons or give spurious ones, and may carve out exceptions. Until he has "accepted the recommendation made by the General Assembly" (para. XVIII)—a condition not previously imposed—he need set up no machinery to implement it[1]. The Applicant submits that both Written Statements supporting the Judgement interpret it so as to set no limits on the Secretary-General's discretionary powers, raising a question of law relating to Article 101, paragraph 1, of the Charter.

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[1] To the date of this writing, no administrative instruction has been issued and no procedure set up to implement General Assembly resolution 37/126, section IV, paragraph 5, pending the Court's determination of this case.

2. Article 100, Paragraph 1, of the United Nations Charter

20. Contrary to the Respondent's assertion, the Applicant at no time "alleged that the Respondent in this case was merely carrying out the instructions of a Government . . ." (para. 99 of the Secretary-General's Statement). The Tribunal acknowledges this (para. XIX). Nor did the Applicant at any time suggest that the "Secretary-General is precluded from taking into consideration formal representations made to him in his official capacity by member States" (para. 100). The Applicant, not being privy to the Secretary-General's appointments, has no means whatever of knowing the content of any representations made to the Secretary-General. The paragraphs in the Application to the Committee listed by the Respondent refer to public statements by high officials of the Secretary-General indicating that *he believed* that further employment of the Applicant was impossible without the consent of the USSR Government, a belief which the Respondent himself has subsequently admitted to be erroneous. It was that belief, and the Tribunal's failure to fault it, that the Applicant alleged to be a dereliction from Article 100.1.

21. The passage from *In re Rosescu* quoted by the Respondent in paragraph 103 directly supports the Applicant's contention in paragraphs 20-22 of his Application to the Committee. It says:

> "If a director-general intends to appoint to the Staff someone who is a *government official* in a member State he will normally consult the member State, who may wish to keep the official in its service. Similarly if such *government official's* appointment is to be extended, it is reasonable that the organization should again consult the member State, which may have good reason to re-employ him." (Emphasis added.)

Since the Applicant was not a government official at the time of the contested decision, having resigned from any offices in the USSR Government, and since he did not seek an extension of an appointment on secondment, the Applicant argued that Article 100.1 prohibited the search for consent of any government, and relieved the Secretary-General of the need to consult any member State.

22. Given the public statements made by his Spokesman and by other high officials as to the necessity of seeking instructions from a member State, the burden was upon the Secretary-General, as the Written Statement of the United States argues (p. 176) to show that he reached his conclusion on grounds wholly independent of the wishes of a member State or States. "When Respondent does not, of his own intitiative, produce such information and evidence . . . the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence" (UNAT Judgement No. 15, *Robinson*). "If an unexplained decision is also apparently inexplicable, silence will provide a foundation for an inference that there must have been at work in the decision-making some element, such as prejudice or a conclusion falsely drawn, which would require the Tribunal to interfere with the discretion" (ILOAT Judgment No. 361, *In re Schofield*; see also UNAT Judgement No. 18, *Crawford*; ILOAT Judgments No. 13, *McIntire*, and No. 415, *Halliwell*). An independent justification, the Applicant submits, is demanded by the much wider injunction of Article 100.1, that international officials "refrain from any action which might reflect on their position as international officials responsible only to the Organization".

23. The Applicant did, however, suggest that the decision to ban him from entering the Headquarters building may have been taken in deference to the wishes of a member State. Once again, not being privy to the Secretary-

General's office, he has no way of knowing what representations, if any, were made. His only knowledge—as set out in paragraph 23 of the Statement on behalf of the Applicant—was that when he reported to work on 23 February 1983 he was told by his supervisor that "a member State" had objected to his presence in the headquarters cafeteria and the second floor coffee shop. Indeed no other plausible explanation for this treatment, usually reserved for felons or undesirables, suggests itself, since the restriction on his movements clearly imposed a hardship and inconvenience on the work of his office (Annex 38 to doc. 19).

24. The Respondent once again seeks to insulate the Tribunal's Judgement from the Court by characterizing as a finding of fact the supposition that the "decision now contested was taken by the Secretary-General after consideration of all the circumstances of the case" (para. 105). No such finding occurs in the paragraphs cited. The Tribunal merely says, in paragraph XIX, that "he (the Respondent) *states* all throughout that the measures he took were in the interests of the United Nations . . ." (emphasis added). That is an explanation of motive, not a finding of fact, and couched in such broad terms as to give the Secretary-General carte blanche to define the interests of the United Nations, if need be, to redefine the Charter.

3. Article 101, Paragraph 3, of the United Nations Charter

25. Although the Applicant referred specially to Article 101.3, along with Staff Regulations 4.2 and 4.4 and Staff Rule 101.14 *(a)* (ii), in his initial request for administrative review as well as his Tribunal Application, only the dissenting opinion weighs the "paramount consideration" of the Charter against other considerations. Neither the majority Judgement, nor the entire Written Statement of the Secretary-General to the Court, contain any acknowledgement that the Applicant was considered by his Office as having met the "highest standards of efficiency, competence and integrity" demanded by the Charter, or that his performance was rated as excellent, and the concurring statement flatly rejects any consideration of competence and efficiency.

The Respondent suggests that Article 101.3 refers to "personal qualities", which may legitimately be ignored in favour of "the overall interests of the Organization". He states that the *Rosescu* Judgment recognizes an inconsistency between the Secretary-General's duties under Article 97, and the requirement that efficiency, competence and integrity shall be the paramount considerations in appointment (para. 111). The passage he cites from *Rosescu*, however, supports the opposite contention: that the interests of the Organization must have primacy over those of member States, and that extraneous considerations have no place in appointment decisions. He also suggests a potential conflict between the mandate of Article 101.3, and the sovereignty of the General Assembly under Article 100.1. The General Assembly may, under Article 100.1, direct and guide the Secretary-General, but both are subject to the constituent treaty of the United Nations.

26. The Respondent's interpretation in his paragraph 116 of the dissenting opinion is puzzling. There is no examination in paragraph 8 (or in para. 10, as the French version has it), or indeed anywhere in the dissent, of the effects of a change of nationality, except that the concluding footnote registers strong reservations about the majority's reference to the Fifth Committee report of 1953, recording a "widely shared view" that "international officials should be true representatives of the culture and personality of which they were nationals".

27. The Respondent states that the dissenting opinion "differs from the Tribunal's Judgement on a simple question of fact". The dissenting opinion differs from the Tribunal's Judgement, on, *inter alia*, the scope of the Secretary-General's discretionary powers, the extent to which discretionary decisions are subject to review, on the nature of secondment and the rights and duties of a seconded staff member, on the nature of the Secretary-General's agreement with the releasing organization, on the intent and scope of resolution 37/126, on what constituted "reasonable" consideration, on the relevance of a decision to seek permanent residence status, and on the weight to be given to Article 101.3. None of these can be characterized as a "simple question of fact". Their application to the material issues of the case led to a totally different conclusion, one consistent with the principle of merit. The Judgement itself, by omitting any consideration of Article 101.3, makes merit subservient to other considerations.

4. Article 8 of the United Nations Charter

28. The Respondent interprets Article 8 as being "solely concerned with discrimination on the basis of sex", and argues that any wider interpretation would "drastically curtail the powers of the General Assembly to regulate recruitment".

Article 8, which the Tribunal described in Judgement No. 162 *(Mullan)* as "a provision of great historic scope", is one of the many reflections in the Charter of a more general principle of equality. Although the legislative history of the Charter indicates that the prohibition of gender-based discrimination was in the minds of those at the Preparatory Commission, the Article is framed so as to have broader application. The plain words of Article 8 prohibit any restriction on the eligibility of any person to participate in any organ of the United Nations under conditions of equality. It is reflected in the Staff Regulations, in terms of a general principle of non-discrimination, under Article IV, which bears the heading "Appointment and Promotion", thus:

> "Regulation 4.3: In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis."

29. What Article 8 prohibits is any restriction on *eligibility* to serve. This does not prohibit the consideration of other factors in any particular employment decision. And, once serving, it prohibits unequal treatment of staff members for any reason forbidden by the Charter.

30. Article 8, according to the Tribunal in *Mullan*, "contains a rule which is legally binding on United Nations organs". Responsibility for its implementation falls upon those who are competent to make rules applicable to the staff, primarily the General Assembly and the Secretary-General. Neither the General Assembly nor the Secretary-General possess powers to regulate recruitment in any way contrary to the principle of equal conditions of employment enunciated in the Charter.

31. Resolution 37/126, section IV, paragraph 5, was an exercise by the General Assembly of its powers to regulate recruitment pursuant to Article 101.1 of the Charter. It placed no restrictions on eligibility for consideration after five years continuous good service. The majority Judgement upheld an "apparent" decision that "in the background of secondment" the Applicant was not eligible for a "probationary appointment" (para. XVIII). The concurring statement found the Applicant "ineligible" for consideration for a career

appointment, because of his stated decision to seek permanent residence status in another country.

32. The Written Statement of the USSR interprets the Tribunal Judgement as finding a number of legal restrictions on his eligibility to participate in any capacity, whether fixed-term, probationary, or under "a separate new contract". Of the restrictions enumerated by the USSR, the first, "the absence of *(a)* trilateral agreement", is forbidden by Article 100.1, since the Applicant was not a government official. The second, Staff Rule 104.12 *(b)*, to which the Applicant's attention was drawn in March 1983, refers to expectancy, but not to eligibility. The third, the "practice" of "recruiting the staff on as wide a geographical basis as possible", was held by the Tribunal in *Estabial* to be an incorrect application of Article 101.3, which may not be used to "refuse to consider the candidatures of United Nations staff members for a vacant post".

The Respondent, on the other hand, says that the Tribunal did not find the Applicant ineligible to serve in the Secretariat, but "simply upheld a discretionary decision by the Secretary-General not to offer him a career appointment at a particular time". The Applicant does not challenge the Secretary-General's discretionary powers of appointment. He submits, however, that that discretion must be exercised in accordance with Article 8 of the Charter.

5. Article 2, Paragraph 1, and Article 100, Paragraph 2, of the United Nations Charter

33. The Respondent states that "the policies of any individual government in respect of the employment of its own nationals by the United Nations can hardly violate the principle of sovereign equality of all member States" (para. 127). The Tribunal was not asked to adjudicate—nor does it have competence to do so—the policies of any individual government. The Tribunal was asked to adjudicate the obligations of the Secretary-General under the Charter and the Staff Rules. If the policies of an individual government conflict with the obligations of the Secretary-General to treat all staff members equally, to give paramount consideration to the principle of merit, to neither seek nor receive instructions from any outside authority, the Secretary-General must, in the words of *Rosescu*, safeguard the interests of the Organization and give them priority over others. In subscribing to the constituent treaty of the United Nations, States have undertaken to respect the political independence of all international civil servants: to neither exert pressures on, nor seek special protections for, their nationals, or those of any other country. To suggest that a staff member of proven merit who has chosen to fulfil, rather than break, his contractual obligations must "face the consequences of his actions"—if those consequences include banishment from Headquarters premises and exclusion from further employment—is to hold the interests of a member State higher than those of the Organization.

34. The Respondent also states that the Applicant's argument denies member States the right to make their views on appointments known to the Secretary-General (para. 128). Under the principle of sovereign equality, all member States may make their views known; but, legally, a Secretary-General may not refuse to appoint or confirm an official on the grounds given in this case by several high officials: opposition by a government (ILOAT Judgments No. 122, *Chadsey*, and No. 431, *Rosescu, inter alia*; also M. Bedjaoui, *Fonction publique internationale et influences nationales*, p. 612). The Charter, in Article 100, and its implementing document, Articles I and IV of the Staff Regulations, establish the principle that officials are recruited as a result of selection by the

Organization, not of the consent or the proposal of member States. Article 2.1 means that this principle must be applied equally to nationals of all countries, and Article 100.2 protects the autonomy of the Secretary-General in the management of his staff, subject only to the regulations of the General Assembly and the provisions of the Charter. The Judgement and concurring statement either evade the material issues posed by this case, or introduce principles alien to the Charter. The Respondent's Statement condones these evasions and fails to assert the autonomy of the international civil service or to accept responsibility for defending its neutrality.

Conclusion

35. In 1949 the Court laid down the principle that the relationship between the Organization and its officials takes precedence over that deriving from nationality, from which flows an obligation to assure administrative and judicial protection to all international officials regardless of their State of origin, whether powerful or weak. In 1954 and 1956 the Court defined the jurisdictional nature of the international administrative tribunals, and set out some of the responsibilities of the organizations towards their staff, responsibilities arising out of the contract of employment. In 1973 and in 1982 the Court recognized the fundamental role of the tribunals in safeguarding officials against wrongful actions of the administration, or against encroachment on their rights by the General Assembly.

36. The Applicant respectfully submits that in Judgement No. 333, the United Nations Administrative Tribunal failed to exercise the jurisdiction vested in it, and committed errors of law relating to provisions of the Charter, such as to reverse the concept of official service within the United Nations progressively developed by the Court in its opinions *supra*. Wherefore the Applicant respectfully requests the Court to render an advisory opinion so as to conform Judgement No. 333 to its own previously stated principles, and to the letter and spirit of the Charter.

(Signed) Diana BOERNSTEIN,
Counsel for Vladimir Yakimetz.

26 June 1985.

Annex B

LEGAL OPINION

on the Validity of Judgement No. 333 of the Administrative Tribunal of the United Nations with Respect to the Charter of the United Nations and the Fundamental Principles of International Civil Service Law[1]

I, the undersigned Alain Pellet, Professor in the University of North Paris and the Paris Institute of Political Studies, having been consulted by the Federation of International Civil Servants' Associations and the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) on the validity of Judgement No. 333 *(Yakimetz* v. *the Secretary-General of the United Nations)*, rendered on 8 June 1984 by the Administrative Tribunal of the United Nations, have expressed the following opinion:

1. By a decision, communicated to him on 23 November 1983 confirmed on 21 December 1983, Mr. Vladimir Victorovich Yakimetz, a staff member of the United Nations, was informed of the non-renewal of his fixed-term appointment which was due to expire on 26 December 1983.

2. With the agreement of the Secretary-General, Mr. Yakimetz filed directly with the Administrative Tribunal of the United Nations, on 6 January 1984, an application in which he requested the Tribunal:

> "A. To consider his case at the Spring, 1984, session of the Tribunal.
>
> B. To order the rescission of the administrative decision, dated 23 November 1983, not to consider an extension to the Applicant's United Nations service.
>
> C. To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983.
>
> D. To adjudge and declare that he had an expectancy of further employment.
>
> E. To adjudge and declare that he was illegally denied his right to reasonable consideration for a career appointment.
>
> F. To order that his name be forwarded to an appropriate body to give him such reasonable consideration for a career appointment.
>
> G. To order payment to the Applicant of salary lost during the period of unemployment between the expiry of his contract and the reconstitution of his career.
>
> H. To order reimbursement of expenses, if any, reasonably incurred by the Applicant in prosecuting this Appeal, such expenses to be determined by the Tribunal before the close of proceedings."

On 8 June 1984, the Tribunal rejected the Application of Mr. Yakimetz by its Judgement No. 333. This Judgement was rendered by two votes to one; Mr. Arnold Kean, the Vice-President, attached the text of his dissenting opinion, and Mr. Endre Ustor, the President, made a statement.

2. In application of Article 11 of the Statute of the Tribunal, Mr.

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[1] A plan of this legal opinion is attached hereto.

Yakimetz—hereinafter referred to as "the Applicant"—claiming that the Administrative Tribunal had exceeded its jurisdiction or competence, that it had not exercised jurisdiction vested in it, that it had committed an error of law relating to provisions of the Charter of the United Nations and that, in the proceedings, it had committed an essential error which had occasioned a failure of justice, requested the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter referred to as "the Committee") to request the International Court of Justice for an advisory opinion on the question.

By 16 votes to 9, the Committee decided, on 23 August 1984, that:

> "there was a substantial basis, within the meaning of Article 11 of the Statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly, the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:
>
> (1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

3. For their part, the organizations representing the United Nations staff and, in particular, the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) and the Federation of International Civil Servants' Associations (FICSA) expressed their grave concern at the decision of the Tribunal and question the validity of Judgement No. 333.

By a letter of 19 December 1984, the President of FICSA requested that the following questions should be examined in the context of the current review procedure:

> "*(a)* In this case, has the Secretary-General correctly applied the rules in force relating to the international civil service?
>
> *(b)* Was the Secretary-General obliged to follow the guidelines given by the General Assembly in the matter and, if so, has he duly fulfilled this obligation?
>
> *(c)* Has the Secretary-General acted in conformity with the relevant provisions of the Charter and, in particular, with Article 2, paragraph 1, and Articles 8, 100 and 101, and with the fundamental principle of the independence of the international civil service?
>
> *(d)* And, more generally, assuming that the Secretary-General has acted in conformity with the law in force, has the Tribunal duly exercised jurisdiction vested in it?" (This letter is annexed hereto.)

Concurrently, the President of the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System (New York) stated, in a letter dated 21 December 1984, that he was gravely concerned about the repercussions of the case on the independence, integrity and neutrality of the international civil service and on the very concept of a career civil service, principles essential to the effective functioning of the United Nations and to its survival as an international organization (this letter is annexed hereto.)

With the concurrence of the two above-mentioned organizations representing the staff, it was agreed that this legal opinion would be prepared once all the arguments of the parties were known and the observations, if any, had been formulated pursuant to Article 66 of the Statute of the International Court of Justice.

This legal opinion is therefore not intended to replace the arguments submitted to the Court on behalf of Mr. Yakimetz. However, as it is drafted for the purpose of the current review proceedings and as it comes after the exchange by the parties of their first submissions, it will focus mainly on commenting, at the level of principles, on the contentions presented during the review proceedings by the Applicant and the Respondent in the Administrative Tribunal (hereinafter referred to as "the Applicant" and "the Respondent") due regard being paid to the comments set forth in the written statements of the Governments of Canada, the United States, Italy and the Soviet Union.

4. The first step should be to attempt to determine the exact scope of the two questions addressed to the Court.

To a certain extent they may actually be thought of as irreconcilable or, at least, alternatives.

Thus, as the Secretary-General rightly points out:

> "The real issue between the parties (. . .) was whether the Applicant's rights were violated by the decision of the Respondent not to grant him a further appointment." (Written Statement, para. 50.)

The Administrative Tribunal has responded to this question in the negative; the Applicant, supported by the United States and, less strongly, by Canada and Italy, criticizes this reply; the Respondent and the USSR Government support it. But it is quite remarkable to note that the respective positions held by the supporters of each of the two arguments advanced differ radically on one fundamental point:

- according to the Applicant (at least in his Application to the Committee on Applications—for his position in the Written Statement submitted to the Court is less precise), the Administrative Tribunal has failed to exercise jurisdiction vested in it *by not replying* to the question which was, in his view, the preliminary question, as to whether any legal impediment existed to his further employment (Application to the Committee, paras. 6 to 16);
- the United States Government apparently supports this analysis (Written Statement, pp. 181, et seq., *supra*) but nevertheless considers that the Tribunal has implicitly *admitted* that the Secretary-General was bound in this connection by the opposition of the Soviet authorities (*ibid.*, pp. 172 and 176, *supra*); the Italian Government's analysis of the Judgement is based on the same ambiguity (Written Statement, pp. 160, et seq., *supra*);
- the Secretary-General, for his part, considers that the Tribunal rightly *refrained from taking a decision* on the matter as the question was not at issue between the parties and not relevant to its adjudication (Written Statement, paras. 58 et seq.);
- whereas the Soviet Government takes the view that the Tribunal rightly *based itself* on the status of Mr. Yakimetz as a seconded official in order to deny him any right to further employment of any type (Written Statement, pp. 155-156, *supra*).

Actually even a superficial reading of the Judgement confirms this last analysis (see para. 7 below); and it is precisely *because* the Tribunal has held the secondment of Mr. Yakimetz to constitute a legal impediment to his further employment that it erred on questions of law relating to provisions of the Charter of the United Nations.

5. The fact that the Administrative Tribunal held the secondment of Mr. Yakimetz to constitute a legal impediment to his further employment does not, however, mean that the reply to be given to the first question addressed to the Court must necessarily be negative.

For one thing, the Court has stated that

> "the test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particualr plea is mentioned *eo nomine* in the substantive part of a judgement: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based . . ." (*Application for a Review of Judgement No. 158, I.C.J. Reports 1973*, p. 193).

In other words, it is for the Court to determine whether the Tribunal, in order to conclude that a legal impediment to further employment existed, examined with sufficient care all the circumstances of the case and, in particular, the situation of the Applicant *vis-à-vis* the Soviet Union (see para. 8 below).

On the other hand it must be noted that the Committee worded this first question in an untypical way by itself indicating what, in its view, constituted non-exercise by the Tribunal of jurisdiction vested in it. The question arises as to whether, in so doing, it does not exceed its terms of reference by unduly limiting the powers which the Court derives from Article 11, paragraph 1, of the Statute of the Tribunal, a provision which has "primacy over the actual terms of the request" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, p. 349) and appears to allow the Committee, which, even less than the Court, cannot be considered a court of appeal, only a choice out of four questions—which it can raise alternatively or jointly. If, as is reasonable, this interpretation—which seems to conform to the "customary" practice of the Committee (cf., *ibid.*, p. 345, and the Report of the Committee in the present case, A/AC.86/30, pp. 29, et seq., *supra*, paras. 8 et seq.)—is upheld by the Court, the Court will be led to address itself to the much more general question as to whether the Tribunal has not also omitted to exercise jurisdiction vested in it for reasons other than that adduced by the Committee.

This question, thus formulated, is particularly interesting because, on several occasions, the Administrative Tribunal, breaking with its tradition of in-depth verification of the facts adduced by the parties, has limited itself, in its Judgement No. 333, to taking for granted the facts as presented by the Respondent. In particular, the Tribunal seems to have replied very partially, or not at all, to the following questions:

(i) Was Mr. Yakimetz, at the time of his appointment, really a Soviet civil servant?

(ii) If it is admitted that he was then on secondment, could he have been considered still on secondment at the time when the problem of further employment arose?

(iii) Independently of a possible right to career employment, was he entitled to claim a fixed-term appointment?

(iv) Does not the position taken by the Respondent amount to placing undue impediments in the way of certain of the Applicant's human rights?

(v) According to what procedures was the Secretary-General to give "every reasonable consideration" to the possibility of granting Mr. Yakimetz a permanent appointment?, etc.

All these questions, which were raised in the proceedings by the Applicant and whose solution was necessary for an exhaustive examination of the case, were not addressed by the Tribunal which did not therefore fully exercise jurisdiction vested in it.

6. Accordingly, it does not seem expedient to deal successively with the two questions presented to the Court. As the Italian Government observes, they are largely interdependent (Written Statement, pp. 158, et seq., *supra*): on the one hand, they are in part mutually exclusive—at least if the first is considered in the same way as it is in the Written Statements submitted to the Court during the first stage of the proceedings (see para. 4 above); on the other hand, it is largely because the Tribunal has not fully exercised jurisdiction vested in it that the Tribunal has committed, or endorsed, errors of law relating to the provisions of the Charter and, in particular, that it has failed to uphold those of its provisions which guarantee the independence of the international civil service (I) and those which assign a higher policy-making authority to the General Assembly in the matter (II).

I. THE TRIBUNAL HAS FAILED TO UPHOLD THE PROVISIONS OF THE CHARTER GUARANTEEING THE INDEPENDENCE OF THE INTERNATIONAL CIVIL SERVICE

7. An essential part of the discussions between the parties and the Governments which have submitted written statements to the International Court of Justice relates to the implications to be drawn from the situation of secondment from the Soviet civil service in which Mr. Yakimetz apparently found himself at the time of the events.

This emphasis on secondment is justified by the key role that this element plays in the reasoning followed by the Administrative Tribunal:

(i) In the first place, the Tribunal states that

> "In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was *impossible* in the circumstances" (Judgement, para. IV);

and the Tribunal holds that this position accords with its previous jurisprudence *(ibid.)*;

(ii) passing on to the matter of legitimate expectancy of renewal, invoked by the Applicant, the Tribunal concludes:

> "*In so far as he was on secondment from the USSR Government*, none of the actions he took could bring about any legal expectancy of renewal of his appointment. *If his fixed-term appointment were not based on secondment*, he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise" (para. XII);

(iii) and finally,

> "In view of the foregoing, the Tribunal concludes that during the period of his service with the United Nations the Applicant was under secondment *which . . . could not be modified* except with the consent of all three parties." (Para. XIII.)

It is thus quite clear that the Administrative Tribunal has held the secondment of Mr. Yakimetz to be an impediment to the renewal of his appointment and even to his cherishing any legitimate expectancy whatsoever thereto (he did not relinquish this conviction until, at the end of the Judgement, it envisaged the implications of General Assembly resolution 37/126, a problem which will be examined later—see paras. 24 et seq.).

8. Quite obviously, the entire case built up by the Tribunal derives from the conviction of its members that the Applicant was in effect seconded from the Soviet civil service. This conviction is based on two elements: the reference to secondment in the last letter of appointment of Mr. Yakimetz, dated 8 December 1982, and the fact that, on 10 February 1983, he addressed to the Permanent Representative of the USSR to the United Nations and to the Secretary-General letters announcing his resignation from the Soviet civil service.

Conversely, there are several arguments to the contrary which are developed at length by the Applicant (cf. his Written Statement, pp. 126, et seq., *supra*) and may be summarized thus: in the Personal History forms, addressed to the United Nations in respect of his successive appointments, Mr. Yakimetz has always stated that he was not a "permanent civil servant" in his country; his previous letters of appointment made no mention of his secondment and, if secondment did not exist in 1977, it could not have existed in 1982 because, in the interval, he had continuously been an international civil servant, which excluded the possibility of his acquiring the status of a Soviet civil servant; finally, the mention of "secondment" in his last contract apparently results from a routine assumption of personnel services which are accustomed to considering all staff members of Soviet nationality to be seconded from the USSR civil service. Certainly the Court is in no way bound by the findings of the Administrative Tribunal, and it can examine "in full liberty the facts of the case or check the Tribunal's appreciation of the facts" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, p. 207). It may then find that the Applicant was not seconded from the Soviet civil service and may hold that, in taking the opposite view and hardly even examining the arguments put forward by Mr. Yakimetz in this connection, the Tribunal omitted to exercise jurisdiction vested in it.

This legal opinion will, however, continue with the issue of secondment—not as being the most likely hypothesis but because the implications which the Tribunal has drawn from the issue of secondment, whose existence it has postulated, raise the most serious problems of principle.

It would seem that, by sanctioning the existence of a separate and new category of appointment—fixed-term appointment "on secondment"—the Administrative Tribunal has seriously jeopardized the principle whereby the Secretary-General, on the one hand, and the staff, on the other hand, perform functions of an exclusively international nature.

It goes without saying that these considerations are particularly relevant as the Applicant was not in fact seconded from the Soviet civil service.

1. The Tribunal Has Sanctioned the Existence of a New Category of Appointment

9. In the appendix to his Written Statement, the Secretary-General specifies three categories of appointment: career appointment, fixed-term appointment, and fixed-term appointment on secondment. This triple breakdown is reiterated by the Soviet Government, whereas the United States refers to the notion of a

"contract of secondment", and the Italian Government speaks of "the contract of a seconded employee".

This presentation concords with Judgement No. 333 which, on two occasions, asserts that the Applicant's appointment was "on secondment" (paras. II and XII); it is, nevertheless, not justified on that account.

10. There is in fact nothing in the Staff Regulations or Rules of the United Nations to support the idea of "appointments on secondment" which would constitute additions to the two categories of appointment, namely, temporary and permanent, provided for in Staff Regulation 4.5 and Staff Rules 104.12 and 104.13.

Quite on the contrary, as stipulated in Staff Rule 104.12:

> "The fixed-term appointment . . . may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, *including persons temporarily seconded by national governments or institutions* for service with the United Nations."

Far from constituting a particular type of appointment, secondment is therefore simply a circumstance, among others, justifying a fixed-term appointment.

Not only is the opposite position held by the Tribunal unsupported by any of the texts which, by virtue of Article 2 of its Statute, the Tribunal is bound to uphold; it is also tantamount to admitting that a United Nations staff member may find himself, *vis-à-vis* the Organization, in a special legal situation that does not correspond to any statutory category and without any action on the part of United Nations bodies. Such a judicial interpretation is compatible neither with Article 97 nor with Article 101 of the Charter. It is, moreover, significant that the Secretary-General has so far been firmly opposed to the establishment of a new type of appointment for seconded staff members (see, for example, his comments on two recent reports of the Joint Inspection Unit in documents A/36/378, paras. 12 and 13 and A/36/432/Add.2, para. 13).

11. As emphasized by the Respondent, "the term 'secondment' is not defined in the Staff Rules" (Written Statement, appendix, para. 6), any more than it is in any statutory or regulatory instrument of the United Nations.

The sole exception in this connection seems to be the one in Article 1 *(d)* of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances, concluded in 1972. This provision reads as follows:

> "*Secondment* is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which he will normally be paid and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization."

This definition can be transposed, though not without precautions to the hypothesis of the secondment of a staff member who is a national of a State member of an international organization.

Furthermore, in its Judgement No. 92 *(Higgins* v. *the SG of IMCO)*, the Administrative Tribunal gave a general definition of secondment that is valid in all hypotheses:

> "the term 'secondment' is well-known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of employment and retains his right to promotion and to retirement benefits".

This approach—quite different from that taken by the Secretary-General (Written Statement, appendix, sec. III)—is based on the idea that secondment establishes a special legal relationship between the staff member and the releasing establishment. On the other hand, *vis-à-vis* the receiving establishment, secondment is a simple fact which certainly does not preclude the latter establishment from weighing it (just as it does in respect of certain factors which it cannot change, such as the age, nationality, qualifications, etc., of the person concerned) but, of course, on the obvious condition that this does not run counter to its rules, especially if they derive from the Organization's public policy. It is *a fortiori* inadmissible that the existence of a special category of appointment, in the determination of which the Organization has played no part, should be sanctioned.

2. The Tribunal Has Failed to Uphold the Discretionary Power of the Secretary-General in the Matter

12. In his Written Statement to the Court, Mr. Yakimetz states that the impugned Judgement "widens the discretionary powers of the Secretary-General at the expense of both the staff and the General Assembly" (p. 109, *supra*). While this comment is accurate as regards the implications drawn by the Tribunal from the adoption by the General Assembly of resolution 37/126 (see para. 24 below), it is not, on the other hand, applicable to the first part of Judgement No. 333 (paras. II to XIII).

On the contrary, since the Tribunal has held that the chief administrative officer of the Secretariat had no alternative but to bow to the refusal of the Soviet Union to renew the Applicant's secondment, it has erroneously admitted that the Secretary-General could surrender the discretionary power conferred by the Charter on the Secretary-General in this connection.

The Charter quite clearly confers discretionary power on the Secretary-General with regard to the recruitment of staff: as chief administrative officer of the Organization, to use the words of Article 97, it is incumbent on him to appoint the staff by virtue of Article 101, paragraph 1, without receiving "instructions from any government or from any other authority external to the Organization", as laid down in Article 100, paragraph 1.

This principle, recognized by a unanimous doctrine (see, for example, Mohammed Bedjaoui, *Fonction publique internationale et influences nationales*, Pedone, Paris 1958, pp. 60 et seq., or Alain Plantey, *Droit et pratique de la fonction publique internationale*, CNRS, Paris, 1977, particularly pp. 301 et seq.), is upheld by an absolutely consistent jurisprudence, particularly as regards the renewal (or non-renewal) of fixed-term appointments (cf. among very many decisions, UNAT, 287, *Harkins* v. *UNRWA*, or ILOAT, 131, *Segers* v. *WHO*; 251, *De Sanctis* v. *FAO*; 415, *Halliwell* v. *WHO*, etc.).

There seems, moreover, to be no disagreement between the parties on this issue, as both the Applicant and the Respondent base themselves (see Judgement, para. XIX) on ILO Administrative Tribunal Judgment No. 431 *(Rosescu* v. *IAEA)* which affirmed both the principle of the chief administrative officer's discretionary power and the limits to this power; Judgement No. 191 of the same Tribunal has given a particularly clear definition of these limits:

> "Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has

> been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority." (ILOAT, 191, *Ballo* v. *UNESCO*.)

Hence the only question that arises is whether, in the case at issue, the Secretary-General exercised the discretionary power vested in him and, if so, whether such exercise was consistent with the limitations inherent in the very concept of discretionary power.

13. Actually, in accordance with an absolutely general principle of law, any authority invested with such a discretionary power cannot leave it to be exercised by a third party (see M. B. Akehurst, *The Law Governing Employment in International Organizations*, Cambridge U.P., 1967, p. 153). And, while international administrative jurisprudence on this point is relatively scarce—heads of Secretariats tend to exceed their powers rather than to refrain from using them—some judicial authorities have nevertheless been led to rescind the acts of authorities which had erroneously held that the power vested in them was tied (see ILOAT, 122, *Chadsey* v. *UPU*; 294, *Connolly-Battisti (No. 4)* v. *FAO*; see also UNAT, 209, *Corrado* v. *UN SG*).

In the same spirit, the international administrative tribunals censure decisions submitted to them when, voluntarily or inadvertently, the Respondent has based his case on an incomplete dossier or has omitted to take essential facts into account (see UNAT, 18, *Crawford* v. *UN SG*; 158, *Fasla* v. *UN SG* and, especially, the abundant jurisprudence of the ILOAT, e.g.: 191, *Ballo* v. *UNESCO*; 230, *Stracey* v. *FAO*, or 388, *Babbar* v. *FAO*).

14. It may, however, happen that the discretionary power is restricted or slanted: this is so when statutory provisions require the head of the Secretariat to take certain expressly stated factors into account; on such occasions the tribunals, without taking the place of the authority in which the power of decision is vested, make sure that the said authority has actually taken these elements into account (cf. UNAT, 62, *Julhiard* v. *UN SG* or ILOAT, 415, *Halliwell* v. *WHO*).

Such was precisely the situation in this case, because Article 101, paragraph 3, of the Charter makes the "necessity of securing the highest standards of efficiency, competence, and integrity" the "paramount consideration" which must motivate the competent bodies "in the employment of the staff and in the determination of the conditions of service".

Certainly a "paramount consideration" is not an "exclusive consideration", and the Respondent is right to infer that he can take into account all the factors that will enable him to decide in the interest of the Organization (see Written Statement, p. 100, *supra*). And it is doubtful that, in the context of review proceedings, the International Court of Justice would agree to substitute its own opinion for the appraisal made by the Secretary-General in the light of the various factors to be taken into consideration.

But such is not the background to the problem that arises in the present case: the Court is not being asked to say what the real interest of the Organization is, but simply to find that the Administrative Tribunal has committed an error of law relating to the provisions of the Charter by sanctioning the fact that the Secretary-General did not seek to determine what that interest was in the light of all the factors which it was incumbent on him to take into account and, first and foremost, the "paramount consideration" specified by the Charter itself.

In this sense, the case at issue does not differ, at least in terms of principles, from the case which recently resulted in Administrative Tribunal Judgement No. 310 *(Estabial* v. *UN SG).* In this case, the Tribunal held that it was not for the Secretary-General to alter the conditions for staff recruitment set forth in Article 101 of the Charter and Staff Regulation 4.2,

> "by establishing as a 'paramount' condition the search, however, legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter in the interests of the service",

although the second sentence of Article 101, paragraph 3, of the Charter expressly makes equitable geographical distribution a factor to be taken into account (in the same sense, see NATO Appeals Committee Decision No. 65 *(a)*, 13 November 1965).

The same considerations should have been applied in the present case. It is a fact that at no time were the strictly professional merits of the Applicant considered, and Mr. Yakimetz was right in stating that they are not mentioned at all in the grounds for the Judgement (Written Statement, p. 133, *supra*), which is further evidence that the exercise by the Tribunal of the jurisdiction vested in it was incomplete.

15. In fact the Secretary-General has not only failed to take account of the "paramount consideration" specified in the Charter but has also considered, improperly, that he could not take it into account because of the opposition of the Soviet Government to extending the renewal of Mr. Yakimetz's appointment. He has thus erroneously surrendered the discretionary power available to him.

In the present proceedings before the Court, the Respondent affirms that:

> "Even in the case of appointments on secondment, the Respondent is free to decide whether such particular appointment is in the interests of the Organization." (Written Statement, para. 102.)

Thus he seems to be asserting the existence of the discretionary power which, in this matter, is indeed vested in him (see also the Respondent's comments to the Tribunal, quoted in the Written Statement, para. 58).

But, immediately after this correct statement, he adds:

> "If he considers it to be so, the Respondent needs to obtain the consent of the Government (or other permanent employer) because secondment is, of necessity, a tripartite affair." *(Ibid.)*

These two propositions are clearly incompatible, as the second amounts to admitting that the Secretary-General cannot exercise the discretionary power theoretically vested in him, because of the veto power that would be exercised by the seconding authority.

It should also be borne in mind that while, before the Court (and already to some extent before the Administrative Tribunal), the Respondent modifies his initial position slightly, it is in respect of the reason invoked in support of the impugned decision that the legality of the decision must be appraised (see UNAT, 89, *Young* v. *UN SG*, or ILOAT, 388, *Babbar* v. *FAO*); now, as the Applicant has shown, it is because the Secretary-General considered himself bound by the views of the Soviet Government that he adopted the decision at issue (Written Statement, p. 147, *supra*). Moreover, it is this very position which was endorsed by the Tribunal (see para. 7 above) and, in the context of the review proceedings, the Court is not called upon to rule on the positions taken in the proceedings by the Applicant but on the merits of the Judgement with respect to the questions addressed to it.

16. It is true that, in support of his main argument, reiterated in the impugned Judgement, the Respondent invoked the authority of an earlier jurisprudence of the Administrative Tribunal (A/AC.86/R.118, p. 5) which, in its Judgements No. 92 *(Higgins* v. *SG of IMCO)* and No. 192 *(Levcik* v. *UN SG)*, held that in every secondment, "there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned", and that

> "Any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved. When a Government which has seconded to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government."

Independently of the limited evidentiary value of these precedents—the *Higgins* case concerned an inter-agency secondment and, in the *Levcik* case, the Tribunal held that there was no secondment—it is far from evident that the inferences which the Judgement (para. IV) and the Respondent (Written Statement, appendix, para. 7) draw from his jurisprudence are correct. The sentences quoted are actually ambiguous.

On the one hand, it is quite clear that extension of the secondment itself requires the consent of the initial employer, but this is a simple fact so far as the Organization is concerned (see para. 11 above); there is no "trilateral agreement on secondment" between the releasing State, the Organization and the person concerned (or, in any case, no evidence of this has been furnished and the regularity of such an agreement could be disputed); actually an internal practice of the Soviet Union has been followed (the facts of which, moreover, Mr. Yakimetz contests on the basis of not insubstantial arguments—see para. 8 above), and this point was mentioned in the Applicant's letter of appointment.

This fact, admitted by the staff member by his signature and known to the Organization, may be taken into account by the Organization at the time of appointment, and it is legitimate for it "to take account" of any change that may occur in this connection.

The Canadian Government rightly points out that "secondments may be a useful tool to encourage a wider selection of staff both geographically and in terms of experience" (Written Statement, p. 166, *supra*); and this tool would have scarcely any meaning unless the employer consenting to the secondment had some reasonable assurance that the arguments that he might present for the return of the person concerned to his releasing establishment would be considered with objectivity.

17. But taking into account the views expressed by the Government of a member State in order to determine what constitutes the interest of the Organization is one thing; to make this the exclusive basis, in this case, for the position adopted is another and very different matter.

> "If a [head of a Secretariat] intends to appoint to the Staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organization should again consult the member State,

> which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forgo taking a decision in the organization's interests for the sole purpose of satisfying a member State. The organization has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them." (ILOAT, 431, *Rosescu* v. *IAEA*.)

Judgement No. 333 (para. XIX) emphasizes that the circumstances of the *Rosescu* case were very different from those of the present case; the essential difference resides in the fact that, in the *Rosescu* case, the Respondent denied that he had yielded to the pressures of Romania which was opposed to the renewal of the Applicant's appointment, whereas, in the present case, the Secretary-General expressly holds that the opposition of the Soviet Union to any extension of the secondment constitutes a legal impediment to renewal of the appointment; furthermore, in the two cases:

— The Applicant was seconded from his national civil service (Mr. Yakimetz contests this but Mr. Rosescu apparently never denied it);
— the person concerned was a staff member whom the service to which he was assigned wished to continue employing;
— the releasing State was opposed to the granting of a further appointment;
— and the reinstatement of the Applicant in his original post could not be contemplated.

Drawing the inference, the ILO Administrative Tribunal rescinded the impugned decision which could only have been taken "at least to a large extent, [in] a desire to defer to the will of the Romanian authorities" *(ibid.)*, thus confirming that, while an organization may take account of the views of member States, it cannot reach its decision solely in the light of the opposition of such a State to a measure affecting a staff member.

> "Such an objection . . . cannot be reconciled with the fundamental principle of the independence of an international organization in relation to its member States; it ought not to form any part of the legal basis of the decision impugned.
>
> In restricting itself to this single reason, which is tainted by illegality, and in omitting to exercise its discretionary power . . . the (Respondent) misinterpreted its own competence, and the decision impugned must accordingly be quashed" (ILOAT, 122, *Chadsey* v. *UPU*);
>
> "The Organization cannot bow to a government's wishes before making sure that they are compatible with its own interests" (ILOAT, 448, *Troncoso* v. *PAHO/WHO*);
>
> "[It] must enjoy the full sovereignty of its own authority and must not be to any extent subject to external influence emanating from any one of its member States; in this respect the most strict and clear provisions guarantee its complete independence and that of its officials" (ILOAT, 15, *Leff* v. *UNESCO*; see also 17, *In Re Duberg*).

This was expressed very forcefully and concisely by the Appeals Board of the International Centre for Advanced Mediterranean Agronomic Studies (ICAMAS) in the first decision which it rendered, on 10 March 1972, under the chairmanship of Professor Maresca, in a case very similar to the present one:

the services of the Applicant, an administrative officer in the French Ministry of the Interior and seconded to the Organization, had been terminated because the French Government had indicated that it would not extend his secondment beyond the specified date. The Appeals Board declared:

> "According to a general principle of the law of international organizations, each organization enjoys full autonomy *vis-à-vis* member States and particularly in its relations with its staff, so that the recall of an official seconded to such an organization by his releasing State cannot *ipso facto* determine the termination of his functions within the said organization." (ICAMAS Appeals Board, *Brault* v. *ICAMAS*.)

For having taken the opposite view, the United Nations Administrative Tribunal has permitted the fundamental principle of the independence of the Secretary-General *vis-à-vis* member States to be seriously distorted. And this is all the more certainly an error of law relating to the provisions of the Charter because this principle is reiterated in Article 100 of the United Nations Charter. At the same time, the Administrative Tribunal has failed to uphold Article 101, paragraph 3—as it has sanctioned the Secretary-General's failure to respect the "paramount consideration" established by that provision—and it has erroneously permitted substitution by the Secretary-General of a competence deriving from the discretionary power conferred on him by Articles 97 and 101, paragraph 1, in the interest of the Organization.

3. The Tribunal Has Failed to Uphold Respect for the Fundamental Guarantees Accorded to United Nations Staff

18. By its grounds, Judgement No. 333 is incompatible with the Charter provisions that make the Secretary-General the sole judge of the interest of the Organization in the matter of staff recruitment and, more generally, of staff policy—subject only to complying with the instructions of the Charter itself or the General Assembly. By its implications, this decision also poses serious threats for the fundamental guarantees accorded by the Charter to United Nations staff (and, for not having concerned itself therewith in spite of the arguments developed at length on this aspect by the Applicant, the Administrative Tribunal has failed to exercise fully the jurisdiction vested in it).

By making seconded staff members "second-class" officials, the impugned Judgement actually jeopardizes both the rights to which Mr. Yakimetz is entitled under the Charter as an international civil servant and what might be called his "professional" or "statutory" rights, and it threatens the exercise by the Applicant of certain human rights which are guaranteed to every human being and for which the United Nations must ensure respect.

In fact, the adjudication

- does not guarantee the independence of certain staff members *vis-à-vis* member States;
- introduces discrimination as between staff members;
- may ultimately endanger exercise of the right of every individual to change his or her nationality;
- and excludes the right to change one's employer.

19. Independence *vis-à-vis* governments and any other authority external to the Organization is both a right and a duty not only for the Secretary-General (see above) but also for all staff members. It is laid down and guaranteed by Article 100 of the Charter:

> "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The principle was accepted even before the founding of the United Nations, Mme. Bastid, for example, wrote as follows:

> "An international institution must be under the control and direction of the representatives of States, but it is not admissible that international civil servants should be in any sense under the control of their State of origin, that being contrary to the concept of international service and even of civil service. In legal terms, an attempt by a State to influence its nationals who are international civil servants runs counter to the obligations which it has contracted, in particular on the establishment of the international body; in practical and administrative terms, any provision that might encroach on the authority of the chief administrative officer and might even take its place is liable to introduce, within the international body, an element of disintegration all of whose implications cannot be evaluated in advance." (Suzanne Basdevant, *Les fonctionnaires internationaux*, Sirey, Paris, 1931, p. 155.)

And today authors are agreed on viewing the independence accorded to staff members *vis-à-vis* States and, in particular, *vis-à-vis* their countries of origin, as the keystone of the international civil service system conceived 40 years ago in San Francisco (cf. M. B. Akehurst, *op. cit.*, pp. 5 ff.; M. Bedjaoui, *op. cit.*, *passim*, not. pp. 57 ff.; Georges Langrod, *La fonction publique internationale*, Sijthoff, Leyde, pp. 75 ff.; Theodor Meron, "Status and Independence of the International Civil Service", *RCADI* 1980-II, No. 167, pp. 285-384, *passim*; A. Plantey, *op. cit.*, pp. 112 ff.; S. M. Schwebel, "The International Character of the Secretariat of the United Nations", *BYBIL* 1953, pp. 71-115; Jean Siotis, *Essai sur le secrétariat international*, Droz, Geneva, p. 209; etc.).

Although they have rarely had occasion to apply the principle directly, international administrative authorities have sometimes reaffirmed its importance (see, in this connection, the jurisprudence quoted in the Applicant's Written Statement and the judgements rendered by the Administrative Tribunals of the ILO and the United Nations in cases arising from the consequences of the "witch hunt" in the United States, especially ILOAT, 15, *Leff* v. *UNESCO*; 17, *Duberg* v. *UNESCO*; UNAT, 18, *Crawford* v. *the Secretary-General*) and, in its above-mentioned decision (see para. 17 above), the ICAMAS Appeals Board emphasized, precisely on the occasion of the non-renewal of the appointment of a seconded staff member because of the opposition of the State of origin, that:

> "It is a general principle that the independence of the international civil servant would be seriously jeopardized if a member State were able to interfere at its own discretion in the relationship between the international organization and its staff member."

20. The fact of making the renewal of any seconded staff member's service

relationship subject to the agreement of his government is incompatible with the very principle of his independence *vis-à-vis* that government.

The grounds on which the Court based its advisory opinion of 11 April 1949 in order to affirm the right of international civil servants to the protection of their Organization provide very sound guidelines in this connection:

> "To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. It he had to rely on that State his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter." (*I.C.J. Reports 1949*, p. 183.)

The same reasoning applies in this case: the independence of international civil servants seconded from their national civil service would be gravely jeopardized if the professional future of the persons concerned within the Organization depended entirely on the goodwill of the releasing establishment; not only would the insecurity inherent in fixed-term appointments be considerably increased, but such a staff member would also have to be blessed with extraordinary strength of character, assuming the occasion arose, to make the interest of the Organization—which could not guarantee him continuous employment—take primacy over the possibly conflicting interest, in a given case, of his government, his former and future employer on whom his future professional career would entirely depend (see, on this point, the comments of the Italian Government, p. 158, *supra*).

The facts given in the impugned Judgement also show that the possibility of pressure being exerted by the government of a member State both on the Organization itself and on staff members of its nationality is not just a schoolroom hypothesis; did not the Soviet authorities, for example, intervene in order to limit to one year the previous renewal of Mr. Yakimetz's appointment (Judgement, para. X); and did they not contemplate "replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant", and suggest to him that he leave for Moscow for that purpose (*ibid.*, para. XI)? These practices ought to be condemned *per se*; the Administrative Tribunal's Judgement, by dangling a sword of Damocles over the heads of seconded staff members, legitimizes such practices or, in any event, opens up very encouraging prospects for their use.

21. At the same time, the Tribunal introduces inequalities between staff members to the extent that it severely limits the career prospects of international civil servants seconded from their national civil services.

Unquestionably, there exists no actual "right to a career" in the international civil service, and the problem is made all the more complex by the fact that fixed-term appointments do not in principle enable their holders to count on their renewal. The fact nevertheless remains that

> "when he takes up service with an organization, an official may reasonably hope some day to advance in grade" (ILOAT, 365, *Lamadie (No. 2) and Kraanen* v. *IPI*; see also No. 526, *Puel* v. *WMO*),

and that staff regulations or rules make no distinction in this connection in terms of types of appointment. Owing to the particular precariousness of their situation and to the influence which, according to the Tribunal, States are entitled to exert on decisions affecting their seconded staff members, these staff members find themselves in a decidedly inferior situation in this respect; indeed, as pointed out by Mr. Yakimetz (Written Statement, pp. 141, et seq., *supra*), this inequality between staff members is accompanied by an inequality between member States because, while the Socialist countries are certainly not the only ones to practise secondment, they are the only ones to do so in a completely systematic manner—see, on a related problem, M. Bedjaoui, *op. cit.*, page 70, who shows that the difficulty already existed, on a much smaller scale, in the 1950s.

The Applicant argues that Article 8 of the Charter demands equal treatment of all staff members (Written Statement, pp. 141, et seq., *supra*). However, while a literal reading of this provision justifies this conclusion, it is not the dominant interpretation which holds that Article 8 prohibits discrimination within the Organization on the basis of gender.

Obviously it does not follow from this that the United Nations must not respect, in its staff relations, the fundamental principle of non-discrimination which, reiterated several times in the Charter (cf. the Preamble or Art. 1, para. 3, Art. 13, para. 1.*b*, Art. 55.*c*, etc.), is absolutely general in scope.

According to President Manfred Lachs,

> "If the United Nations is to promote, 'With a view to the creation of conditions of stability and well-being . . . based on respect for the principle of equal rights . . . of peoples', 'conditions of economic and social progress and development' (Charter, Art. 55), it is obviously bound to proclaim and practise the same principles within its internal legal system: not only to avoid but to bar all types of discrimination among those serving this Organization." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, p. 419.)

22. The same reasoning applies to other human rights whose exercise is compromised by the impugned Judgement.

The question arises, in the first place in the context of the rights of every human being to leave his or her country, to seek and avail himself or herself of asylum in any other country and to change his or her nationality (rights proclaimed respectively in Arts. 13, 14 and 15 of the Universal Declaration of Human Rights of 10 December 1948).

It is in the Written Statement of the United States Government that this problem is addressed in most detail; but it is addressed rather ambiguously because, after criticizing the Administrative Tribunal for holding that the Secretary-General, in his decision, had to take into account the change of nationality requested by Mr. Yakimetz (pp. 177, et seq., *supra*), that Government concedes that the Judgement admits, implicitly, that that was not a bar to renewal of the appointment (pp. 183, et seq., *supra*).

If that is so, it is unlikely that the Court will accede to the wish expressed by the United States Government that the Court should confirm explicitly this implicit finding of the Tribunal so as to clarify the law (*ibid.*, p. 183, *supra*), for that is not the purpose of review proceedings.

But it is not certain that the United States interpretation of paragraph XII of Judgement No. 333 is the correct one: even though the Tribunal presents the problem with some hesitation (it refers to the "question of his suitability as an international civil servant"), it nevertheless also refers to its Judgement No. 326 *(Fischman* v. *UN SG)* and to documents on which it had based itself in order to hold that, *a priori*, an application for permanent residence status in the United States "in no way represents an interest of the United Nations".

Regardless of the fact that the circular quoted was not in force in 1983, as Mr. Yakimetz (Written Statement, p. 136, *supra*) shows, the question arises as to whether this remark does not reflect some regrettable confusion on the part of the Tribunal; either, as seems to be admitted in the Judgement itself (para. XII, *in fine*), it is a needless digression whose only point would be to create suspicion about the Applicant's personality; or this reasoning constitutes support of the finding and must be analysed to be an error of law because it would mean that international civil servants find themselves denied the rights referred to above which belong to every man and woman. This is the position unless one admits, as the Administrative Tribunal has done in its Judgement No. 326 (*Fischman*, above), that the person concerned could "resign from his post and release himself thereby from all constraints of the service", but to enjoy one's internationally proclaimed human rights at the expense of losing one's job is very uncompromising logic and would create an unacceptable dilemma.

While there is, without doubt, a great deal of truth and wisdom in the idea that, so far as possible, international civil servants must not be "intellectual or spiritual stateless persons", this can be nothing more than a general political principle which may not be invoked as a rule of law in any given case against a particular civil servant. And it would be particularly unacceptable in the present case since Mr. Yakimetz made it known very quickly that he intended to acquire the nationality of another State Member of the Organization.

As Judge Bedjaoui wrote, strictly in line with the ILO Administrative Tribunal's jurisprudence of the 1950s (see ILOAT, 17, *Duberg* v. *UNESCO*);

> "Respect for alleged national loyalty is legally irreconcilable, whatever may have been said about it, with international loyalty and must remain alien to the international civil service" (*op. cit.*, p. 162).

23. Whatever uncertainties may exist concerning the scope of the Judgement in question as regards the right to change one's nationality, there is another human right which this decision certainly violates: that of the free choice of one's work and of one's employer, to which every human being is entitled (by virtue, *inter alia*, of Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights of 6 December 1966).

While, strictly speaking, the Judgement did not require the Applicant to return to the service of his former employer, which, moreover, would have exceeded the Tribunal's competence and would hardly have been realistic—excluded from the international civil service, Mr. Yakimetz is free to seek work elsewhere. But, here again, the reasoning is based on very uncompromising logic as it implies the existence of an automatic link between the end of secondment and the end of employment in the United Nations (see, in particular, para. 7 above), the Administrative Tribunal actually requires seconded staff members to resume their former function or to take a very serious risk. It is, moreover, the existence of this risk which exposes staff members "on secondment" most to pressures from their releasing State (see para. 20 above).

One might well ask whether the very notion of secondment does not imply, for the seconded person, an obligation to return to the service of his original employer on the expiry of the period specified. Apart from the fact that, in Judgement No. 333, the Tribunal says nothing of the kind and limits itself to holding that the person concerned "must face the consequences for his actions" (para. XII), it would seem that such an excessive obligation imposed by law and one that contravenes recognized human rights should be justified only by express and clear rules; no such rules were invoked either by the Respondent or the Administrative Tribunal.

Furthermore, the very definition of secondment (see para. 11 above) indicates that secondment is conceived first of all in the interest of the staff member: he derives therefrom the assurance that he can be reinstated in his releasing establishment. The earlier jurisprudence of international administrative tribunals is also clearly established in this sense, as pointed out in the dissenting opinion of Mr. Kean, attached to the Judgement, which quotes the cases of *Higgins, Levcik* and *Rosescu* (No. 9), but there are very many more examples; thus, in its Judgement No. 56 (*Aglion* v. *UN SG*), the United Nations Administrative Tribunal made it clear that a United Nations staff member temporarily assigned to the Technical Assistance Board could, at the end of such assignment, be reinstated in a Secretariat post. Conversely, the same Tribunal held that another United Nations staff member, seconded to the Technical Assistance Board, had duly resigned from his original post and the Tribunal had drawn the relevant inferences (UNAT, 95, *Sikand* v. *UN SG*).

This last decision stands in sharp contrast to Judgement No. 333 in which the Tribunal refused to ascribe any legal effect whatsoever to the resignation from the Soviet civil service submitted by the Applicant on 10 February 1983.

Hence the Administrative Tribunal has found that the Applicant could not release himself from the professional bond linking him—according to the Tribunal—to the Government of his country and has not recognized the right of Mr. Yakimetz—a right to which every person is entitled—to change his employer.

Furthermore, following this line of logic, by limiting itself to examining the question as to whether the Applicant was entitled to renewal of his *secondment* (as this is particularly apparent from the partial finding set forth in paragraph XIII of the Judgement) whereas the real problem was that of the renewal of the *appointment*, the Tribunal has failed to exercise jurisdiction vested in it on an essential point.

II. THE TRIBUNAL HAS FAILED TO UPHOLD THE SOVEREIGN POLICY-MAKING POWER VESTED IN THE GENERAL ASSEMBLY

24. Curiously, the Administrative Tribunal, which has based itself on the particular nature which, according to it, should be attributed to fixed-term appointments "on secondment" in order to deny any entitlement to, and any legitimate expectancy of, renewal of the service relationship of Mr. Yakimetz on a temporary basis, makes almost no reference to secondment in the part of the Judgement where closer examination is given to the question of granting the Applicant a career appointment (paras. XIV-XX).

It is true that this passage of the decision is difficult to interpret because one of the two members of the "majority", Mr. E. Ustor, the President, dissociates himself from the reasoning followed on this point and states, with regard to the fact of secondment that "the Applicant was in my view not eligible for consideration for a career employment", whereas almost the entire dissenting opinion of the Vice-President, A. Kean, is devoted to establishing not only that the Applicant was entitled to every reasonable consideration for a career employment but also that this was not done.

In any event the result is that this part of the Judgement is approved only by one member of the Tribunal.

It does not, however, seem necessary to dwell on the statement of the President of the Tribunal: being based on the same reasoning as that followed in the first part of the Judgement, it comes up against the same objections and calls for the same comments.

So far as the Judgement itself is concerned, it raises mainly two problems: that of the legal merits of resolution 37/126 and, above all, that of the content of the resultant obligations for the Secretary-General.

25. As regards the first point, attention must be drawn to the unusual nature of the Tribunal's course of action which begins by establishing at length the fact that "the Applicant did not draw sufficiently early the Respondent's attention to the resolution under discussion" (para. XVI) and then continues with the words "the Respondent was bound nonetheless by its terms" *(ibid.)*.

While this is so, the Judgement, the dissenting judge and the parties (Written Statement of the Applicant, p. 145, *supra*, and of the Respondent, p. 91, *supra*) seem to agree in finding that the Secretary-General was obliged to implement resolution 37/126 in spite of the fact that it had not been formally incorporated into the Staff Regulations (besides Judgement No. 249, *Smith* v. *UN SG*, quoted in the dissenting opinion, see, for example, UNAT, 57, *Harris and others* v. *UN SG*).

This opinion can be taken to be unanimous, because the President, Mr. Ustor, in his statement and perhaps the USSR Government in its Written Statement, dispute not the mandatory nature of the resolution but its applicability to the present case. All the same, it is consistent with the provisions of Article 101, paragraph 1, of the Charter and with the sovereign authority exercised by the General Assembly over the Secretary-General under Article 97.

26. With regard to the merits, there is no doubt that the laconic wording of the relevant provision makes for great uncertainty concerning its exact scope:

> "*The General Assembly,*
>
> *Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

The least of these uncertainties is probably the one which caused President Ustor to differ from his colleagues and which concerns the question of the applicability of the resolution to seconded staff. To this question the dissenting opinion replies in the affirmative on the basis of altogether convincing arguments and, in particular, of the preparatory work done on the resolution which leaves no room for doubt (No. 11). In any case, for the reason given in paragraph 24 above, there is no need to go into this controversy in detail.

Given the reticence of the text and, to a very large extent, of the preparatory work—dealing with the principle raised by the resolution but scarcely touching on the problem of its implementation—it is certainly more difficult to determine the meaning of the expression "shall be given every reasonable consideration". As pointed out in the Judgement, "The General Assembly resolution is silent on who should give 'every reasonable consideration' and by what procedure" (para. XVIII); and there is reason to feel somewhat diffident about admitting that this last point has been cleared up by resolution 38/232 whereby the General Assembly recommends that the organizations should normally dispense with the requirement for a probationary appointment following a period of five years' satisfactory service: this text actually moves a step further on from the expectancy created by resolution 37/126, but it by no means specifies the procedure to be followed for its implementation.

27. In his Written Statement, the Respondent considers that, as the text adopted by the General Assembly is silent on the point, he has full discretionary power with regard to its implementation and

> "is entitled to adopt informal procedures rather than use the formal advisory machinery established by the staff rules such as the Appointment and Promotion Board" (para. 95).

So far as its principle is concerned, this position appears to be correct and in conformity with the provisions of Article 101, paragraph 1, of the Charter which allows the Secretary-General great freedom of action in what might be called the "gaps in the rules" left by the General Assembly. But, as already stressed, discretionary power "must not be confused with arbitrary power" (see para. 12 above). In particular, it is important that the Secretary-General should decide only after a reasonable procedure enables him to be fully informed.

28. In the present case it seems difficult to take this condition for granted. First of all, the question arises as to whether the Secretary-General was entitled to dispense with the intervention of the Appointment and Promotion Board which, under Staff Rule 104.14.*f.* (i)—adopted by the General Assembly—has the function of recommending in respect of "proposed probationary appointments and other proposed appointments of a probable duration of one year or more", for it is hard to see in what respect resolution 37/126 should imply any exception whatsoever to the pre-existing procedures. In any case, in accordance with a general principle of law, consistently applied by international judicial authorities, the chief administrative officer of the Secretariat must, when taking a decision affecting the status of a staff member, seek to apprise himself of all aspects of the problem (see, for example, UNAT, 203, *Sengal* v. *UN SG*, or ILOAT, 32, *Garcin* v. *UNESCO*; 136, *Goyal* v. *UNESCO* or 268, *Bâ* v. *WHO*). Now, in the present case, the Secretary-General did not establish any body and did not seek any impartial opinion before taking the decision not to grant Mr. Yakimetz a career appointment.

He maintained this attitude during the adversary proceedings in the Administrative Tribunal, limiting himself to affirming that he had "given reasonable consideration" to the Applicant's case for the purposes of a career appointment but without giving any further explanation either about the procedure followed or about the grounds for his decision. Thus, the Respondent has not fulfilled the obligation incumbent on him

> "to enable the Court to render a complete decision on the dispute" (ILOAT, 574, *Hubeau* v. *EPO*, see also, for example, UNAT, 4, *Howrani and others* v. *UN SG* or 131, *Restrepo* v. *UN SG*).

In comparable cases, the Tribunal has censured such an attitude on the part of the Respondent; thus, in its Judgement No. 310 (*Estabial*, above):

> "The Applicant and the Respondent disagree as to whether the Applicant's candidature (for a vacancy) was ruled out without being taken into consideration or examined (. . .). The Tribunal's first task was to settle this point",

although the Respondent had declared that he had "carefully examined" this candidature. The Tribunal has done no such thing in the present case, any more than it has used the powers of inquiry, vested in it under Articles 10 and 17 of its Rules, to obtain information, thereby omitting to exercise jurisdiction vested in it.

In the circumstances of the present case, the Tribunal's passivity is all the more open to criticism because it led the Tribunal to put forward a hypothesis concerning the grounds on which the Respondent based its decision, grounds which cannot justify the decision:

> "He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment" (para. XVIII).

Contrary to what the Respondent writes, the Tribunal has not "found" that "all the circumstances were considered" (Written Statement, para. 96): it has in fact committed the same error on questions of law relating to the provisions of the Charter as that which is analysed in paragraphs 12 et seq. above relating to the non-renewal of the Applicant's appointment.

In addition, it seems unacceptable that the Secretary-General, whose powers in respect of staff recruitment are, by Article 101, paragraph 1, of the Charter, made subject to compliance with the rules laid down by the General Assembly, should void them of their substance and exempt himself from all control in their application. By tolerating this attitude, the Administrative Tribunal has failed to comply with the rules laid down by the Charter relating to the hierarchy of the respective competencies of the General Assembly and of the Secretary-General in this field.

29. *In conclusion, there are, in Judgement No. 333 of the Administrative Tribunal of the United Nations several errors in questions of law relating to provisions of the Charter and to the fundamental principles of international civil service law, and it appears that the Tribunal has omitted to exercise jurisdiction vested in it on several important points, even though the two categories of flaws tainting the decision cannot always be clearly distinguished.*

Done at Paris, on 17 June 1985
in three copies,

Alain PELLET.

Plan of the Legal Opinion

1. The issue before the Administrative Tribunal of the United Nations.
2. The request for an advisory opinion addressed to the International Court of Justice.
3. Purpose of the legal opinion requested.
4. Question of the compatibility of the questions addressed to the Court.
5. Scope of the first question addressed to the Court.
6. Plan of the legal opinion.

I. THE TRIBUNAL HAS FAILED TO UPHOLD THE PROVISIONS OF THE CHARTER GUARANTEEING THE INDEPENDENCE OF THE INTERNATIONAL CIVIL SERVICE

7. Role of the notion of secondment in the reasoning of the Tribunal.
8. Question of the reality of secondment.

1. The Tribunal Has Sanctioned the Existence of a New Category of Appointment

9. Sanctioning by the Tribunal of the notion of "appointment on secondment".
10. Non-existence in law of "appointments on secondment".
11. Definition of "secondment"—Secondment is a simple fact with respect to the Organization.

2. The Tribunal Has Failed to Uphold the Discretionary Power Vested in the Secretary-General

12. A discretionary power is vested in the Secretary-General.
13. Obligation to exercise the discretionary power.
14. Obligation to take into account the "paramount consideration" referred to in the Charter.
15. Substitution by the Respondent of a power deriving from the discretionary authority vested in him.
16. The Secretary-General may take into account the fact of the secondment . . .
17. . . . but he cannot rely on an external authority in taking decisions within his discretionary power.

3. The Tribunal Has Failed to Uphold the Fundamental Guarantees Accorded to United Nations Staff

18. Statutory rights and human rights.
19. Importance of the principle of the independence of international civil servants.
20. Violation of the principle by Judgement No. 333.
21. Violation of the principle of the equality of staff members.
22. Question of violation of the right to change one's nationality.
23. Violation of the principle of the freedom to choose one's employer and the right to renounce secondment.

II. THE TRIBUNAL HAS FAILED TO UPHOLD THE SOVEREIGN POLICY-MAKING POWER VESTED IN THE GENERAL ASSEMBLY

24. A Judgement rendered "by the minority".
25. Mandatory nature of General Assembly resolution 37/126.
26. Uncertainties relating to the meaning of resolution 37/126.
27. Discretionary power of the Secretary-General.
28. The errors committed by the Tribunal.
29. Conclusion.

Annex 1. Letter Dated 19 December 1984 from the President of the Federation of International Civil Servants' Associations.

Annex 2. Letter Dated 21 December 1984 from the President of the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations System.

Annex 1. Federation of International Civil Servants' Associations

FICSA/AMCL.PAR/84.50 Paris, 19 December 1984.

MR. ALASTAIR MCLURG, PRESIDENT, TO MR. ALAIN PELLET

On 23 August 1984, the Committee on Applications for Review of Administrative Tribunal Judgements decided to submit Judgement No. 333, rendered on 8 June 1984 by the United Nations Administrative Tribunal in the case of *Yakimetz against the Secretary-General*, to the International Court of Justice.

Gravely concerned by the position taken by the Tribunal in this Judgement, the Federation of International Civil Servants' Associations (FICSA) wishes to make its contribution to the presentation of Mr. Yakimetz's contentions during the proceedings in the Court of The Hague.

To that end, we have decided, by agreement with Mr. Yakimetz and the Co-ordinating Committee of Independent Staff Associations and Unions (which includes among its members the United Nations Staff Union (New York)), to request a legal opinion from a specialist in international civil service law on the validity of this Judgement with respect to the fundamental principles in force. Would it be possible for you to undertake this work?

If, as we hope, your reply is affirmative, we should be grateful if you would examine, in particular, the following questions with regard to the current review proceedings:

(a) In this case, has the Secretary-General correctly applied the rules in force relating to the international civil service?

(b) Was the Secretary-General obliged to follow the guidelines given by the General Assembly in the matter and, if so, has he duly discharged this obligation?

(c) Has the Secretary-General acted in conformity with the relevant provisions of the Charter and, in particular, with Article 2, paragraph 1, and Articles 8, 100 and 101 and with the fundamental principle of the independence of the international civil service;

(d) And, more generally, assuming that the Secretary-General has acted in conformity with the law in force, has the Tribunal duly exercised the jurisdiction vested in it?

I would draw your attention to the fact that the deadline for the written submissions of the parties has been set at 14 February 1985; as Mr. Yakimetz wishes to be able to attach this legal opinion and, as the case may be, the comments of FICSA to his own comments, I should be most grateful if you would notify me of your agreement in principle as soon as possible.

(Signed) Alastair McLurg,

President.

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ANNEX 2. THE CO-ORDINATING COMMITTEE FOR INDEPENDENT STAFF UNIONS AND ASSOCIATIONS OF THE UNITED NATIONS SYSTEM

21 December 1984.

THE PRESIDENT, STAFF COMMITTEE, TO PROFESSOR ALAIN PELLET

The United Nations Staff Union is gravely concerned at the implications for the Staff and for the Organization itself of Judgement No. 333 of the United Nations Administrative Tribunal.

The Co-ordinating Committee, representing the 25,000 staff members of the common system including the UN Staff Union, and the Federation of International Civil Servants, representing the 30,000 staff members of the common system have decided that the issues posed by this case transcend the well-known differences between our two federations, and have joined to request from you an independent written statement analyzing the applicable law and judicial principles, to be annexed to the Statement of the Applicant, Mr. Yakimetz, before the International Court. FICSA will convey to you their concerns by separate letter.

For your part we feel the case has substantial implications for the independence, integrity and neutrality of the international civil service. We feel the concept of a career international civil service with proper contractual guarantees is a fundamental part of the UN system and essential to the original intention of the Charter. Furthermore, it is important that merit be considered the primary factor for appointment and promotion and that all staff regardless of nationality be afforded equal treatment.

If the international system as we know it is to survive and flourish it must be based upon the recognition that national or political considerations must be subordinate to the values exemplified in the UN Charter. We have fully supported Mr. Yakimetz in his attempt to ensure that as an international civil servant he be given due consideration for continued employment with an Organization he has undertaken to serve with distinction for many years.

I trust you will reflect all these concerns in your brief. I wish to thank you in advance for your valuable assistance.

(Signed) George IRVING,
President
Staff Committee.

2. COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

1. The United States herewith submits its comments on the Statements concerning United Nations Administrative Tribunal Judgement No. 333 *(Yakimetz)* of the Secretary-General of the United Nations (the Respondent) and the Union of Soviet Socialist Republics (USSR). These comments are submitted pursuant to the decision of the President of the Court of 5 March 1985, made under Article 66, paragraph 4, of the Statute and Article 105, paragraph 2 *(a)*, of the Rules.

II. COMMENTS OF THE UNITED STATES OF AMERICA ON THE STATEMENT SUBMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

A. The Tribunal's Judgement Fails to Meet Even the Minimal Standard Suggested by the Respondent for Determining Whether the Tribunal Exercised the Jurisdiction Conferred upon It

2. The Court has been asked by the Committee to determine whether the Tribunal failed to exercise jurisdiction conferred upon it. At paragraphs 47-49 of its Statement, the Respondent sets out the criteria it contends the Court should use in making this determination. The Respondent states in conclusion that:

> "The Tribunal exercises its jurisdiction if it examines the substance of the Applicant's allegations or pleas and determines whether those allegations constitute 'non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members' . . ." (Respondent's Statement, para. 49.)

This is a minimal standard. The United States believes that a higher standard should apply, and that in certain cases a tribunal has not only the right, but the obligation to raise certain issues on its own [1]. It is not necessary, however, to argue here for a stricter standard, since the Tribunal's Judgement clearly fails to meet even the minimal test suggested by the Respondent.

3. According to the Respondent, the Tribunal must first "examine the substance of the Applicant's allegations". In this case, the Applicant alleged that the Respondent improperly failed to consider the Applicant's request for career employment because the Respondent mistakenly believed that it was legally barred from doing so (Judgement, p. 49, *supra*). The Applicant's allegation is supported by the unambiguous language of the Respondent's letter of 21 December 1983, wherein it was stated that ". . . the Organization agreed

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[1] If, for example, the parties to a particular case were to fail to make reference to a fundamental issue of Charter interpretation the Tribunal would certainly not be barred from examining it. Indeed there can be no doubt that, were such an issue to be relevant to such a case, the Tribunal would commit error if it failed to raise the issue *sua sponte*.

to so limit the duration of your United Nations service . . ." and by the virtually contemporaneous statements of three responsible officials of the Respondent, all of which confirmed that the Respondent believed at that time that it had no choice but to deny further employment to the Applicant absent approval by the Soviet authorities, which under the circumstances, was clearly not to be forthcoming.

4. In its pleadings the Respondent put forward a different version of the facts. It argued that the refusal to consider the Applicant's request had resulted from an unfettered exercise of discretion (Respondent's Answer, paras. 21-24). Although the Respondent brought forward no evidence that its version of the facts was accurate, the Tribunal nonetheless apparently accepted it without even noting that a fundamental issue of fact divided the parties, much less ruling upon that issue. As a result, the Tribunal adopted a factual context for its Judgement wherein the Applicant's allegation concerning a possible legal bar could not logically be addressed. The Tribunal thus failed completely either to "examine the substance" of that allegation or to "determine" whether it constituted a violation of the Respondent's obligations. These failures were fundamental errors of procedure occasioning injustice as well as failures to exercise jurisdiction.

B. The Respondent's Statement with Respect to the Issue of Failure to Exercise Jurisdiction Is Ill-Founded and Unpersuasive

1. CONTRARY TO THE RESPONDENT'S STATEMENT, THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT *WAS* IN ISSUE BETWEEN THE PARTIES

5. The Respondent makes three arguments in support of the assertion that the Tribunal did not fail to exercise its jurisdiction to determine whether a legal bar existed to the further employment of the Applicant on a non-seconded basis. The first of these arguments is that "the question to which the Committee referred was not in issue between the parties" (Respondent's Statement, para. 57). As has been noted above, it was the Respondent's re-writing of history and the Tribunal's unquestioning acceptance of this unsupported version of the facts that allow the Respondent now to indulge in this sophistry. The legal issues in this case relating to the exercise of jurisdiction and the question of procedural error arise not from a formalistic comparison of the parties' pleadings but from the evidence, which is uncontroverted. That the facts to the contrary were before the Tribunal only serves to underline the extent of its failure to exercise jurisdiction. The evidence shows the Respondent refused to consider the Applicant's request because it believed itself to be legally bound not to do so. The Applicant alleged that no such legal prohibition existed. At this point the issue was joined. The Tribunal, according even to the minimal standard suggested by the Respondent, was obligated to "examine" that issue despite the fact that the Respondent asserted in subsequent arguments that it did not exist. The Tribunal failed to discharge its obligation.

2. THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT IS A CONCRETE ISSUE THAT THE TRIBUNAL WAS OBLIGATED TO ADDRESS AND ADJUDICATE

6. Secondly, the Respondent seeks to characterize the Applicant's allegations with respect to the existence of a legal bar as "an abstract question" upon which

the Tribunal was not only free not to comment, but was, in fact, obliged to leave unaddressed. The Respondent asserts that the Tribunal

> "must limit itself to pass judgement upon allegations (or pleas) of non-observance of contracts and terms of appointment. The Tribunal must, therefore analyze any pleas submitted to it to determine whether those pleas involve an allegation of non-observance and, if so, then pass judgement on those allegations." (Respondent's Statement, para. 59.)

7. One searches the Judgement in vain, however, for the analysis the Respondent asserts the Tribunal must conduct. The Respondent claims that evidence of the requisite analysis is implicit in the fact that the Tribunal made no reference to the question of a legal bar when it "associated" the Applicant's pleas with the legal issues in the case (Respondent's Statement, para. 60). But the sudden disappearance of further reference to this question is far more plausibly explained by another hypothesis. It is that the Tribunal simply neglected to deal with the issue because it could not arise logically in the false analytical context the Tribunal had constructed upon the unsupported assumption that the Respondent's factual assertions were correct.

8. In the view of the United States, proper exercise of its functions by any judicial body requires at least a minimal amount of explication in its decisions. Those who turn to the Tribunal's Judgements for guidance concerning their rights and obligations should not be forced to grope for meaning without a clue as to what the Tribunal concluded or why. Failure to address issues squarely before the Tribunal, which must be decided in order to produce a logically comprehensible judgement, constitutes, in our view, failure to exercise jurisdiction as that term is used in the first question posed to the Court by the Committee[1]

9. Even had the Tribunal ruled, either implicitly or explicitly, that the Applicant's plea with respect to a legal bar did not pose a question upon which the Tribunal was competent to rule under Article 2 of its Statute, the United States believes such a ruling would have been incorrect. Such a ruling would merely have changed an implicit failure to exercise jurisdiction into an explicit one. The Applicant argues in the context of publicly available facts and statements that the Respondent made his decision not to consider the Applicant's request under a misapprehension concerning his legal obligations. In so doing, the Applicant argues, the Respondent failed to give effect to General Assembly resolution 37/126 (IV), which was binding upon the Respondent and therefore constituted a part of the terms and conditions of the Applicant's contract. This issue falls squarely within the terms of Article 2 of the Tribunal's Statute, and the Tribunal was thus fully competent to rule on it. It is not "abstract"; it is, rather, a concrete issue upon which the entire case turns.

3. ADJUDICATION OF THE QUESTION OF WHETHER A LEGAL BAR EXISTED TO THE FURTHER EMPLOYMENT OF THE APPLICANT IS LOGICALLY REQUIRED AT THE THRESHOLD OF THE ANALYSIS OF THIS CASE

10. The Respondent claims in its third argument with respect to the Committee's question concerning jurisdiction that the issue of whether the Respondent was legally barred from offering continued employment would have become

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[1] Those trained in the civil law tradition might instead characterize the Tribunal's failure to so much as consider the factual issues, much less its failure to explain why it ignored the Applicant's plea with respect to a legal bar, as a "procedural error leading to injustice".

ripe for decision only if the Tribunal had first found either that the Applicant had a legal expectancy of further employment or that the Respondent had failed to accord the Applicant's request "every reasonable consideration" as required by resolution 37/126 (IV). The Respondent concludes by asserting that "[s]ince neither of these preconditions existed, it follows logically that no answer is required" (Respondent's Statement, para. 61).

11. In fact, logic is a stranger to this argument. Logic requires that the issue of whether a legal bar existed be resolved before, not after, the questions of expectancy and whether "every reasonable consideration" was accorded the Applicant's request are addressed (see, Exposé du Gouvernement italien, para. 4). If a legal bar existed, then *ipso facto*, a legal expectancy could not. If a legal bar did not exist, then an expectancy might or might not exist, depending upon the facts. If a legal bar had existed, the Respondent would not have been obliged to consider the Applicant's request (as the Respondent indeed alleged in his letter of 21 December 1983). In the absence of a legal bar, the Respondent would have been obligated under resolution 37/126 (IV) to give the Applicant's request "every reasonable consideration", as the Applicant contended in his pleadings to the Tribunal [1].

12. As the Tribunal's Judgement amply demonstrates, it is impossible to make sense of this case unless the question of whether the Respondent was legally required to seek the approval of the Soviet authorities before employing the Applicant after 26 December 1983 is answered at the threshold of the analysis. The Tribunal's failure, for whatever reason, to deal with this critical preliminary issue constitutes a failure to exercise jurisdiction.

C. The Respondent Misconstrues the Tribunal's Decision with Respect to Whether "Every Reasonable Consideration" Was Given to the Applicant's Request

13. The Tribunal's ruling on the issue of whether "every reasonable consideration" was given the Applicant's request is of great importance to the law pertaining to the Respondent's obligations under General Assembly resolutions as a general matter, and it is therefore regrettable that the Respondent grossly misconstrues that ruling. The Respondent asserts that "[t]he Tribunal . . . concluded that this consideration had, *in fact*, been given" (Respondent's Statement, para. 74). The Tribunal did not so "conclude". It ruled, rather, that the *Respondent* was to be the sole judge of whether "every reasonable consideration" had been accorded the Applicant's request, and that the *Respondent* had so concluded (Judgement, para. XVII). The Tribunal thus purported to transfer the jurisdiction conferred upon it by its Statute to another organ of the United Nations, i.e., the Secretariat. The United States believes this purported transfer of jurisdiction to be invalid, and that the failure of the Tribunal itself to rule on whether "every reasonable consideration" was accorded the Applicant's request was a failure of jurisdiction within the context of the Committee's ques-

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[1] The conclusion that the Applicant did not benefit from a legal expectancy does not, as the Respondent argues at paragraph 73 of its Statement, dispose of the question whether the Respondent abused discretion it purportedly exercised when it refused to consider the Applicant's request. The negative finding with respect to expectancy only allows this latter question to be asked; it does not provide the answer. See also paragraph 31, *infra*, where the United States comments on the use of this same argument by the Soviet Union.

tion to the Court, as well as an error of law relating to the Charter of the United Nations.

14. The Respondent moreover incorrectly characterizes this supposed finding by the Tribunal as a "factual conclusion", seeking thereby to insulate it from the scrutiny of the Court. The United States can conceive of no question more clearly legal in nature than whether a certain course of action pursued by a party to a dispute was or was not consistent with that party's legal obligations. Whether the Respondent complied with the mandatory standard imposed by resolution 37/126 (IV) and with its obligations under the Charter are the central *legal* questions that were before the Tribunal and are now before the Court.

D. The Respondent's Statement with Respect to the Committee's Question concerning Charter Interpretation Misconstrues the Respondent's Obligations under the Charter

15. In its second question the Committee asks the Court to determine whether the Tribunal erred on questions of law relating to provisions of the Charter of the United Nations. Although the Respondent addresses six Charter provisions in its statement, the United States will confine its comments to the Respondent's arguments with respect to Articles 101 and 100.

1. ARTICLE 101

16. This case raises three issues with respect to Article 101. Was resolution 37/126 (IV) binding on the Respondent, and was it therefore obligated under Article 101 to apply it with respect to the Applicant's request? What, under the circumstances, did that obligation require the Respondent to do? Did the Respondent do what was required?

17. The first issue is not disputed; the resolution binds the Respondent, and is therefore a "regulation established by the General Assembly" falling under Article 101.

18. With respect to the content of the Respondent's obligation, the Tribunal holds that, in the absence of specific implementing instructions from the General Assembly or of Staff Rules providing administrative procedures, it is up to the Secretary-General to decide how the obligation is to be discharged (Judgement, para. XVIII). But the Respondent's discretion is not unbounded. Even the Respondent admits that it was "of course, obliged to apply the resolution in substance" and argues that it did so by "having regard to the interests of the Organization", "to the qualities of the staff member", the "need to recruit staff on as wide a geographical basis as possible", and "to the qualities of existing staff and the need to secure fresh talent" (Respondent's Statement, paras. 95 and 96).

19. There is, however, no basis in the uncontroverted facts of the case for the assertion that the Respondent in fact fulfilled its obligation to give the Applicant's request "every reasonable consideration" "in substance". To the contrary, the record clearly indicates that at the time it considered the Applicant's request in December 1983, the Respondent believed that it was legally barred from employing the Applicant after 26 December 1983 absent Soviet approval. Being under this basic misapprehension, the Respondent gave *no* consideration to the request. Only if the legal bar the Respondent thought existed had, in fact, existed, could it be possible to find that no consideration was "reasonable" under the circumstances.

20. Even under the factual hypothesis advanced by the Respondent, its

actions would fail to meet the standard of "every reasonable consideration". An exercise of discretion based upon "mistake of fact or law" is invalid (Mr. Kean's dissent, para. 4 (quoting *Rosescu*, para. 5)). By taking into account "the events of 10 February and thereafter" (i.e., the Applicant's decision to change his nationality and the severing of his relations with the Soviet Government), the Respondent would have committed a mistake of law, as the taking into account of these factors would have been contrary to Article 100. Under either factual hypothesis, therefore, the answer is the same: the Respondent failed to accord to the Applicant's request "every reasonable consideration", as it was required to do under resolution 37/126 (IV) and thus under Article 101 of the Charter.

2. ARTICLE 100, PARAGRAPH 1

21. In its Statement the Respondent implies that the Court is precluded from examining the question of whether its actions constituted the receipt "of instructions from any government or from any other authority external to the Organization" or "reflect[ed] on [its] position as international officials responsible only to the Organization" (Art. 101, para. 1) because the Tribunal

> "found as a fact that: '. . . there has been no allegation, and far less any evidence, that the Respondent sought instructions from any member States, or that he had in any manner let the wishes of a member State prevail over the interests of the United Nations . . .' " (Respondent's Statement, para. 75).

The Respondent argues that the Tribunal's acceptance of the assertion that its actions were not contrary to Article 100, paragraph 1, constituted a finding of fact, and that "[s]uch a finding of fact does not involve a question of law, let alone a question of law relating to the provisions of the Charter" (Respondent's Statement, para. 105).

22. This effort by the Respondent to portray as an issue of fact a clear question of Charter interpretation is a transparent attempt to exclude from the Court's review a fundamental legal issue in this case. The Court's mandate is "to judge whether the interpretation adopted by the Tribunal is in contradiction with requirements of the provisions of the Charter of the United Nations" (*Mortished*, para. 64). No matter which version of the facts is adopted, whether what the Respondent did with respect to the Applicant's request was or was not consistent with the Charter is not an issue of fact, but an issue of law, upon which the Tribunal ruled and which the Court is thus bound to examine.

23. The United States has set out in detail in its Statement the reasons why it believes the Tribunal's finding that the Respondent's actions were in accord with Article 100, paragraph 1, is erroneous (US Statement, p. 176, *supra*). Nothing in the Respondent's Statement addresses these arguments, and the United States therefore stands by them. We believe a rebuttable presumption that Article 100, paragraph 1, has been violated is created when it is shown that the Respondent has altered a proposed personnel decision in a manner less favourable to the interests of the Organization after protests against the originally-planned action have been received from a member State. Unless this presumption is incorporated in the law pertaining to United Nations personnel actions (as it has been in the IAEA's law as a result of the *Rosescu* decision), employees victimized by improper pressures will be effectively deprived, *inter alia*, for want of access to the evidence, of the ability to enforce their rights, and the guarantees of Article 100, paragraph 1, will be emptied of substantive content.

3. Article 100, Paragraph 3

24. The Respondent argues in his Statement that the question of whether it is legitimate for the Respondent to take into account the Applicant's intent to change his nationality was not in issue and that the Tribunal determined this to be so (Respondent's Statement, para. 114). The Respondent is mistaken. The Tribunal did not hold that these matters "were not in issue since private legislation was to be introduced into the United States Congress to avoid these problems". The "problems" referred to in this passage concerned waiver of privileges and immunities by employees of the United Nations who become permanent resident aliens in the United States, *not* whether the Respondent could legitimately consider the Applicant's intent to change his nationality, which is an entirely separate question. The Tribunal's ruling with respect to the latter issue was that "the Applicant must necessarily face the consequences for his actions", of which one was that

> " 'those who elected to break their ties with [the country of which they were nationals when they entered United Nations service] could no longer claim to fulfil the conditions governing employment in the United Nations' " (Judgement, para. XII).

25. This doctrine first appeared in the *Fischman* case (UNAT Judgement No. 326), which was decided while *Yakimetz* was before the Tribunal by a panel including two of the members of the *Yakimetz* panel. The United States believes that there is no legally acceptable basis for the attempt to relate it to the instant case. It is, after all, one thing to recognize that the Secretary-General may decline to grant permission to waive certain privileges and immunities and quite another to find an intent to change nationality, or more accurately to seek to change nationality, is relevant to an individual's suitability as a United Nations employee. Article 100, paragraph 3, establishes three paramount criteria (efficiency, competence and integrity) to be employed by the Respondent in making personnel decisions. A change in an employee's nationality, much less an intent to seek a change, relates to none of the three paramount criteria. The Tribunal has ruled in the *Estabial* case that not even considerations of geographical distribution may be used to overturn an employment decision reached on the basis of an assessment of an employee's efficiency, competence and integrity. The same must hold true of considerations of nationality, which are nowhere mentioned in the Charter. Such considerations, if permitted to be regarded as relevant, would be subversive of the very notion of an international civil service. The conflict between *Estabial* on the one hand and *Fischman/Yakimetz* on the other cries out for resolution by the Court.

III. COMMENTS OF THE UNITED STATES ON THE STATEMENT SUBMITTED BY THE USSR

A. The Statement of the USSR Misconstrues the Issues Raised by the Committee with Respect to Exercise of the Tribunal's Jurisdiction

26. At paragraph 3 of its Statement, the USSR asserts that the Tribunal "must itself determine in every specific instance the scope of its jurisdiction, as is clearly stated in Article 2, paragraph 3, of its Statute". The cited paragraph states that "[i]n the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal".

27. In the instant case, however, there is no dispute between the parties over the competence of the Tribunal, including its competence to rule on the question of whether a legal bar existed to the further employment of the Applicant by the Respondent after the expiry of his fixed-term contract on 26 December 1983. Nor is there any indication in the Judgement that the Tribunal ever considered that it might not have competence to rule. The question is, rather, whether, being competent to rule, did the Tribunal fulfil its obligation to exercise its jurisdiction as spelled out in Article 2, paragraph 1, of its Statute. The reference in the Soviet Statement to Article 2, paragraph 3, is therefore inappropriate and superfluous.

B. The Statement of the USSR with Respect to the Question Posed by the Committee to the Court concerning Exercise of Jurisdiction Is Inconsistent with the Nature of Employment Contracts in the United Nations, Misconstrues the Effect of Staff Rule 104.12 (b), and Misinterprets the Tribunal's Judgement with Respect to the Effect of Change of Nationality on an Employee's Eligibility for Further Employment

28. The Statement of the USSR asserts that

> "in its Judgement the Tribunal provided answers to all legal aspects of the case, including the question, raised in the Applicant's claim, concerning the existence of legal impediments to his further employment with the United Nations" (USSR Statement, para. 5).

The Statement goes on in the same paragraph to identify three subissues upon which, it is asserted, the Tribunal adjudicated, and by so doing disposed of the Applicant's plea regarding the existence of a legal bar to further employment.

29. The first of the three subissues is whether a legal bar existed to the "extension of a one-year contract after its expiry on 26 December 1983 [1]" (USSR Statement, para. 5). The Soviet Statement argues that

> ". . . the Tribunal in paragraph IV concluded that 'any subsequent change in the terms of the secondment initially agreed on, for example, its extension, obviously requires the agreement of all three parties involved'. It is therefore clear that the absence of such trilateral agreement constitutes a legal impediment to the extension of the Applicant's fixed term contract [2]." (USSR Statement, para. 6.)

30. The United States submits that this argument is a non-sequitur. The trilateral secondment arrangement and the bilateral contract of employment are separate legal entities. Analysis of one casts no light on issues pertaining to the other. Even accepting *arguendo* the proposition that the Applicant, Respon-

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[1] The issues before the Tribunal in fact related only to the Applicant's request for consideration for a career position. "Extension" (i.e., renewal) of his employment on a fixed-term basis was addressed *sua sponte* by the Tribunal, and is addressed here only because it has been raised once more by the USSR.

[2] This argument suffers from the same confusion over use of the term "extension" that characterized the Tribunal's Judgement. See, US Statement, p. 168, n. 2, *supra*. It is not the practice of the United Nations to "extend" fixed-term contracts. They are, rather, "renewed", i.e., a new letter of appointment is issued with respect to each such contract, and each such contract is thus a separate legal instrument, unencumbered by any "special conditions" that might have affected its predecessors (see, UN Staff Rules, Annex II).

dent, and Soviet Government were bound by a secondment arrangement until 26 December 1983 (but see, US Statement, pp. 178-181, *supra*), this forms no basis to conclude that that arrangement continued in force after that date or that the Applicant and the Respondent were obligated to seek the approval of the Soviet authorities should they have wished to enter into a bilateral employment contract on a career basis taking effect after 26 December 1983. The Tribunal, in fact, does not address in its Judgement the issue of whether such approval would be necessary, which is precisely the reason the United States believes that the Tribunal failed to exercise its jurisdiction in this regard.

31. The second subissue addressed in the Soviet Statement is whether the Respondent was legally barred from converting the Applicant from fixed-term to career status. The Soviet Statement asserts that Staff Rule 104.12 *(b)* bars such a conversion (USSR Statement, para. 7). The United States disagrees. The rule states only that the Applicant has no *expectancy* of conversion arising from his service, no matter how well performed, on a fixed-term basis. It does not state that the Respondent could not have converted the Applicant's status should it have wished to do so.

32. The third subissue raised in the Soviet Statement is whether the Respondent was barred from further employment with the United Nations because he had sought to change his nationality. The Soviet Statement implies that the Tribunal held that an attempt to change nationality constitutes such a legal bar. The opposite is in fact the case. The Tribunal found that the Respondent had properly exercised its discretion to reject the Applicant's request for conversion to career status [1] (Judgement, para. XVIII). Had the Tribunal perceived the Applicant's actions as a legal bar, logic dictates that it could not have so ruled, as in that case no discretion would have been allowed. This interpretation of the Judgement is buttressed by the fact that Mr. Ustor in his dissent disagreed explicitly with the Tribunal's Judgement on this very point, taking the position that ". . . the Applicant was in my view not eligible for consideration for a career appointment", i.e., the same view now advanced by the Soviet Union.

C. The "Answer" of the Soviet Union to the Question Posed by the Committee to the Court concerning Charter Interpretation

33. The second question posed to the Court by the Committee was whether the Tribunal had erred on questions of law relating to provisions of the Charter of the United Nations. In supporting the Tribunal's Judgement, the Soviet Statement simply quotes the relevant provisions of the Charter and United Nations General Assembly resolution 37/126 (IV), states that the Tribunal found that no violations of these instruments had occurred, and asserts in a completely conclusory and unsupported manner that the Tribunal was correct in all respects (USSR Statement, pp. 156 and 157, *supra*). The Statement of the USSR offers no independent analysis to support the Tribunal's findings, ignores the arguments raised by the Applicant in this regard, and implies, contrary to Article 11 of the Tribunal's Statute and Article 65 (1) of the Statute of the Court, that the Tribunal's findings are final and unreviewable by the Court.

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[1] This finding was made without supporting analysis of the facts—which are entirely to the contrary—and is, in addition, inconsistent with the Tribunal's treatment of the same issue in paragraph XII of the Judgement. Whatever its faults, however, it is clear that this finding contradicts the argument that the Tribunal found that an attempt to change nationality constitutes a legal bar to further employment.

34. In the view of the United States, the USSR has said nothing of legal substance in its Statement with respect to the Tribunal's interpretation of the Charter. The Soviet Statements in this regard are therefore not susceptible to substantive legal comment, and we offer none.

IV. CONCLUSION

35. Nothing in the Respondent's Statement or that of the USSR has caused the United States to alter its views with respect to this case. The same unwillingness to confront the issues that characterizes the Tribunal's Judgement infects these documents as well. In the view of the United States these issues are:

(a) What is the basis of the case? If it is that the Respondent believed it was legally barred from employing the Applicant after 26 December 1983 and therefore refused to consider the Applicant's request to be considered for such employment, was that belief correct? If it is that the Respondent weighed the substantive factors relating to continued employment of the Applicant and decided not to employ him further, was that exercise of discretion consistent with the requirements of the Charter?

(b) Who determines whether the Respondent complied with the requirements of resolution 37/126, the Tribunal or the Respondent itself?

(c) May "every reasonable consideration" include consideration of the objections of the Soviet Government to the further employment on a career basis of a person who has severed all his relations with that Government? If the answer is affirmative, how can that answer be squared with Article 100, paragraph 1, of the Charter?

(d) Does a change in nationality, more accurately in the instant case an intention to seek a change, disable a member of the United Nations Secretariat from further employment with the Organization or otherwise provide legitimate grounds to deny him further employment? If so, how is this to be reconciled with Article 100, paragraph 3, of the Charter?

(e) How is the Tribunal's Judgement to be reconciled with the notion of the Secretariat of the United Nations as an international civil service dedicated uniquely to the best interests of the Organization, and protected from undue influence from powerful member States by a vigilant and energetic Secretary-General?

(f) If the risk of a negative reaction by a powerful member State gives rise to a legitimate denial of employment in the interests of the Organization, is this equally true if the member in question is small and weak?

36. The United States urges the Court to consider these issues and to rule on them forthrightly. Only then can the rights of the Applicant as an international civil servant be upheld, the interests of his fellow staff members be protected, and the integrity of the United Nations be preserved.

READING OF THE ADVISORY OPINION

PUBLIC SITTING

held at the Peace Palace, The Hague, on 27 May 1987,
the President, Judge Nagendra Singh presiding

LECTURE DE L'AVIS CONSULTATIF

AUDIENCE PUBLIQUE

tenue au palais de la Paix, à La Haye, le 27 mai 1987,
sous la présidence de M. Nagendra Singh, Président

PUBLIC SITTING (27 V 1987, 3 p.m.)

Present: President NAGENDRA SINGH; *Vice-President* MBAYE; *Judges* LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV; *Registrar* VALENCIA-OSPINA.

READING OF THE ADVISORY OPINION

The PRESIDENT: The Court meets today in order to deliver in open Court, in accordance with Article 67 of the Statute, the Advisory Opinion requested of it by the Committee on Application for Review of Administrative Tribunal Judgements in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.* That Judgement was given by the Tribunal in proceedings brought against the Secretary-General of the United Nations by Mr. Vladimir Viktorovich Yakimetz.

In accordance with the usual practice I shall not read the opening paragraphs of the Opinion, which deal with the procedural history of the case and the facts of the case as found by the Tribunal. For the understanding of what follows, I shall indicate some of these salient facts, but I must emphasize that the Advisory Opinion contains a much fuller summary.

Mr. Yakimetz, a national of the Union of Soviet Socialist Republics, was employed by the United Nations from 1969 to 1974, and re-entered United Nations service in 1977 on a five-year fixed-term appointment on secondment from the USSR Government. His appointment was extended for one year expiring on 26 December 1983; early in 1983, he was asked whether he would be in a position to accept a further extension of his contract. On 9 February 1983 the Applicant applied for asylum in the United States of America, and on 10 February 1983 he informed the USSR authorities that he was resigning from all positions he held in the Soviet Government, and that he had made an application to the Government of the United States of America requesting asylum. On 25 October 1983, the Applicant raised the question of further extension of his contract, due to expire on 26 December 1983, or even better, a career appointment. On 23 November 1983 he was informed that it was not the intention of the Organization to extend his fixed-term appointment. In subsequent correspondence, the Applicant relied on a resolution of the General Assembly, resolution 37/126, by which the General Assembly decided "that staff members on fixed-term appointments upon completion of five years continuing good service should be given every reasonable consideration for a career appointment". The Applicant's employment with the United Nations came to an end on 26 December 1983; on 6 January 1984 the Applicant filed an Application to the United Nations Administrative Tribunal. On 9 January 1984, he submitted a personal history form to the United Nations, by way of application for further employment. At this time certain statements by United Nations officials reported in the press suggested that the reason for the cessation of his employment was opposition by the Government of the USSR.

The Advisory Opinion sets out the statement by the Tribunal of the principal contentions of the Applicant and the Respondent, and the legal issues involved in the case. It then proceeds to give the following summary of the Judgement of the Tribunal.

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[The President reads paragraphs 10 to 96 of the Opinion [1].]

I now call upon the Registrar to read the operative clause of the Advisory Opinion in French.

[Le Greffier lit le dispositif en français [2].]

Judge Lachs appends a declaration to the Advisory Opinion of the Court. Judges Elias, Oda and Ago append separate opinions to the Advisory Opinion of the Court. Judges Schwebel, Sir Robert Jennings and Evensen append dissenting opinions to the Advisory Opinion of the Court.

In accordance with established practice, the Advisory Opinion has been read today from a mimeographed text; the usual printed edition will be available in due course.

The sitting is closed.

(Signed) NAGENDRA SINGH,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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[1] *I.C.J. Reports 1987*, pp. 20-72.

[2] *C.I.J. Recueil 1987*, p. 72.

CORRESPONDENCE

CORRESPONDANCE

1. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

11 September 1984.

I have the honour to acknowledge receipt of the letter of 28 August 1984 whereby Your Excellency informed the President of the Court that the Committee on Applications for Review of Administrative Tribunal Judgements had on 23 August 1984 decided to request of the International Court of Justice an advisory opinion on an application for the review of Judgement No. 333 of the United Nations Administrative Tribunal, and to inform you that your letter, with which you transmitted certified copies of the English and French texts of the Committee's decision, was duly filed in the Registry on the date of its receipt, namely 10 September 1984.

In accordance with Article 66, paragraph 1, of the Statute of the Court, I shall be notifying all States entitled to appear before the Court of the request for an advisory opinion. I shall shortly transmit to you a copy of the printed Request, containing the text of your letter in English and French, as transmitted to those States.

I have taken note that in accordance with Article 65, paragraph 2, of the Statute of the Court you will be transmitting to the Court all documents likely to throw light upon the question. I have further taken note that, in accordance with Article 11, paragraph 2, of the Statute of the United Nations Administrative Tribunal, you will be arranging for the transmission to the Court of such views as the person in respect of whom Judgement No. 333 was rendered may wish to submit.

(Signed) Santiago TORRES BERNÁRDEZ.

2. THE DEPUTY-REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

28 September 1984.

I have the honour to refer to your letter of 28 August 1984, by which you were good enough to communicate to the Court a decision taken on 23 August 1984 by the Committee on Applications for Review of Administrative Tribunal Judgements concerning a request for advisory opinion. Today, in accordance with Article 66, paragraph 1, of the Statute of the Court, I have notified all States entitled to appear before the Court of the request for an advisory opinion. I am enclosing herewith, for your information, a copy of the printed Request, containing the text of your letter in English and French, as transmitted to those States.

In connection with this Request, I have the honour to draw your attention to Article 66, paragraph 2, of the Statute of the Court, which provides:

> "The Registrar shall also, by means of a special and direct communication, notify any State entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the

> President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."

In pursuance of this provision, I have the honour to inform you by this special and direct communication that in the present case the United Nations and its member States have been considered by the President of the Court as likely to be able to furnish information on the question, and that, by an order dated 13 September 1984, a copy of which is also enclosed, the President has fixed 14 December 1984 as the time-limit for the submission of written statements. The subsequent procedure has been reserved for further decision.

I am further to inform you that the President considers that it would facilitate the work of the Court on this request for advisory opinion if, as in previous cases, any written statement presented on behalf of the United Nations, and any other documentation, were made available to the Court in both the official languages of the Court (English and French).

(Signed) Eduardo VALENCIA-OSPINA.

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3. LE GREFFIER ADJOINT AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN [1]

28 septembre 1984.

J'ai l'honneur, en exécution de l'article 66, paragraphe 1, du Statut de la Cour internationale de Justice, de faire tenir ci-joint à Votre Excellence un exemplaire, imprimé par les soins du Greffe, de la requête pour avis consultatif transmise à la Cour par le Secrétaire général de l'Organisation des Nations Unies en vertu d'une décision du Comité des demandes de réformation de jugements du Tribunal administratif en date du 23 août 1984.

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4. LE GREFFIER ADJOINT AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN [1]

28 septembre 1984.

Il est connu de Votre Excellence que, le 23 août 1984, le Comité des demandes de réformation de jugements du Tribunal administratif des Nations Unies a pris la décision suivante:

> «Le Comité des demandes de réformation de jugements du Tribunal administratif, à la 4e séance de sa vingt-quatrième session, tenue le 23 août 1984, a décidé que la demande de réformation du jugement n° 333 du Tribunal administratif rendu à Genève le 8 juin 1984 repose sur des bases sérieuses au sens de l'article 11 du statut du Tribunal.
>
> En conséquence, le Comité des demandes de réformation de jugements du Tribunal administratif prie la Cour internationale de Justice de donner un avis consultatif sur les questions suivantes:

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

> « 1) Dans son jugement nº 333, du 8 juin 1984 (AT/DEC/333), le Tribunal administratif des Nations Unies a-t-il manqué d'exercer sa juridiction en ne répondant pas à la question de savoir s'il existait un obstacle juridique au renouvellement de l'engagement du requérant à l'Organisation des Nations Unies après la venue à expiration de son contrat le 26 décembre 1983 ?
>
> 2) Le Tribunal administratif des Nations Unies, dans le même jugement nº 333, a-t-il commis une erreur de droit concernant les dispositions de la Charte des Nations Unies ? »

Le texte de cette décision est parvenu au Greffe de la Cour le 10 septembre 1984. Sous le couvert d'une lettre en date d'aujourd'hui une édition imprimée en a été communiquée à Votre Excellence en exécution de l'article 66, paragraphe 1, du Statut de la Cour.

Le paragraphe 2 du même article du Statut prévoit :

> « à tout Etat admis à ester devant la Cour et à toute organisation internationale jugés, par la Cour ou par le Président si elle ne siège pas, susceptibles de fournir des renseignements sur la question, le Greffier fait connaître, par communication spéciale et directe, que la Cour est disposée à recevoir des exposés écrits dans un délai à fixer par le Président, ou à entendre des exposés oraux au cours d'une audience publique tenue à cet effet ».

Appliquant cette disposition, j'ai l'honneur de faire connaître à Votre Excellence, par la présente communication spéciale et directe, qu'en l'espèce et à ce jour l'Organisation des Nations Unies et ses Etats Membres ont été jugés par le Président susceptibles de fournir des renseignements sur la question et que, par ordonnance datée du 13 septembre 1984, dont un exemplaire est joint, le Président a fixé au 14 décembre 1984 la date d'expiration du délai pour la présentation d'exposés écrits. La suite de la procédure est réservée.

Au cas où votre gouvernement désirerait se prévaloir de la faculté qui lui est ouverte de présenter un exposé écrit dans le délai ainsi fixé, j'attacherais du prix à en être informé aussitôt que possible. J'ajoute que l'exposé devrait être rédigé soit en français soit en anglais, langues officielles de la Cour (article 39, paragraphe 1, du Statut).

5. THE SECRETARY OF THE COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS TO THE REGISTRAR

8 October 1984.

Further to my letter of 4 September 1984, I am sending you herewith three copies (in English, French and Spanish) of the report of the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/30) reflecting its deliberations at the twenty-fourth session and decisions on the applications submitted by Mr. Yakimetz, Mr. Large and Mr. Fischman.

I am also attaching three copies of the verbatim record of the 5th meeting of the Committee at which in accordance with paragraph 4 of Article VII of the rules of procedure, the decision of the Committee on the application of Mr. Yakimetz was formally announced and members of the Committee made statements for the record. This verbatim record is provided only in English and in French as required by paragraph 2 of Article XI of the Committee's rules of procedure.

(Signed) Vladimir GOLITSYN.

6. THE REGISTRAR TO THE SECRETARY OF THE COMMITTEE FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

18 October 1984.

Thank you for your letter of 8 October 1984 enclosing copies of the Report of the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/30) reflecting its deliberations at the twenty-fourth session and decisions on the applications submitted by Mr. Yakimetz, Mr. Large and Mr. Fischman.

Thank you also for the copies of the verbatim record of the 5th meeting of the Committee at which the decision on the application of Mr. Yakimetz was formally announced.

7. THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE TO THE DEPUTY-REGISTRAR

21 November 1984.

I have the honor to refer to your letter of 28 September 1984 addressed to the Secretary of State of the United States of America. In that letter you inform the United States, pursuant to Article 66, paragraph 2, of the Statute of the Court, that the United Nations and its member States have been considered by the President of the Court as likely to be able to furnish information to the Court on questions raised in the request of 23 August 1984 from the United Nations Committee on Applications for Review of Administrative Judgements for an advisory opinion concerning Administrative Tribunal Judgement No. 333, which was delivered at Geneva on 8 June 1984.

I have the honor to advise the Court that the United States intends to avail itself of the right to present a written statement to the Court in this case.

I have been informed that the United Nations has requested that the time-limit fixed by the President be extended. The United States would also find an extension of the time-limit convenient, and hopes that the President will rule favorably on the request of the United Nations.

(Signed) Davis R. ROBINSON.

8. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

26 November 1984.

I have the honour to refer to the Order of 13 September 1984 in respect of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, which Order fixes 14 December 1984 as the time-limit within which written statements may be submitted to the Court in accordance with Article 66, paragraph 2, of the Statute of the Court.

On behalf of the Secretary-General I would like to seek an extension of time until 28 February 1985 in which to file the Written Statement on behalf of the United Nations. The reason for this request, which is regretted, is that pressure of business during the current session of the General Assembly has made it impossible to complete the Written Statement by the date fixed.

I also wish to advise that we expect that the dossier of documents to be submitted pursuant to Article 65, paragraph 2, of the Statute and Article 104 of the Rules of Court will be available by 14 December 1984.

Counsel for Mr. Yakimetz is being informed of this request.

(Signed) Carl-August FLEISCHHAUER.

9. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

(telex)

30 November 1984.

With reference to your letter of 26 November 1984, transmitted by facsimile, concerning the time-limit for the submission of written statements in the case concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, I have the honour to inform you that by Order dated 30 November 1984 the President of the Court has extended that time-limit to 28 February 1985. Member States are being advised forthwith by letter.

10. THE REGISTRAR TO THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE

30 November 1984.

I have the honour to acknowledge receipt of the letter dated 21 November 1984, addressed to the Deputy-Registrar, by which you were so good as to inform the Court that the United States intends to avail itself of the right to present a written statement to the Court in the proceedings on the request for an advisory opinion concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

Having noted, further, that your Government would find convenient an extension of the time-limit for the filing of such a statement, I wish to advise you that the President of the Court has today made an Order whereby, following a request made on behalf of the Secretary-General of the United Nations, the time-limit has been extended to 28 February 1985. A copy of the Order will be despatched to you in due course.

11. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[1]

30 novembre 1984.

J'ai l'honneur de me référer à la lettre que le Greffier adjoint vous a adressée le 28 septembre 1984 au sujet de la requête pour avis consultatif soumise à la

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour. Le même envoi a été fait au Secrétaire général de l'Organisation des Nations Unies.

Cour et qui concerne une *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies*. Il était notamment indiqué dans cette lettre que le Président de la Cour avait fixé au 14 décembre 1984 la date d'expiration du délai pour la présentation d'exposés écrits à la Cour, en application de l'article 66, paragraphe 2, du Statut.

Il m'incombe aujourd'hui de porter à votre attention que, le Secrétaire général de l'Organisation des Nations Unies ayant demandé un report, le Président a pris aujourd'hui une ordonnance prorogeant le délai prévu jusqu'au 28 février 1985. Un exemplaire de cette ordonnance est joint à la présente lettre; des exemplaires imprimés seront ultérieurement transmis par les voies habituelles.

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12. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

14 December 1984.

I have the honour to refer to the Orders of 13 September 1984 and 30 November 1984 in respect of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* and to my letter of 26 November 1984 which indicated that the dossier of documents to be submitted pursuant to Article 65, paragraph 2, of the Statute and Article 104 of the Rules of Court would be available by 14 December 1984.

On behalf of the Secretary-General I wish to advise that copies of the dossier, 30 each in English and in French were today dispatched to the Court. A copy in each language was also transmitted to counsel for the Applicant.

As the proceeding before the Tribunal and the Committee on Applications for Review of Administrative Tribunal Judgements were centred on the meaning of paragraph 5 of Section IV of General Assembly resolution 37/126 and on paragraph 5 of Section VI of General Assembly resolution 38/232, Part II of the dossier concentrates on the direct drafting history of these provisions, while Part I contains the documents directly relevant to the proceedings. If the Court wishes any further background information, perhaps in the light of any Written Statements subsequently submitted, the Secretary-General would, of course, be pleased to submit any additional documentation deemed relevant by the Court.

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13. THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS TO THE REGISTRAR

3 January 1985.

In reply to your letters No. 72530 and No. 72531 dated 28 September 1984 I have the honour, in accordance with the instruction which I have received, to send to you the remarks of the Soviet side concerning the questions submitted to the International Court of Justice for advisory opinion.

(Signed) V. BELETSKY.

14. THE FIRST SECRETARY TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS

3 January 1985.

I have the honour to acknowledge receipt, with Your Excellency's letter of today's date, of the written statement submitted by your Government in the proceedings on a request for advisory opinion concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

(Signed) C. POUX.

15. THE FIRST SECRETARY TO THE LEGAL COUNSEL OF THE UNITED NATIONS

4 January 1985.

I have the honour to acknowledge receipt of the letter you addressed to the Registrar on 14 December 1984 on behalf of the Secretary-General concerning the documents supplied by him pursuant to Article 65, paragraph 2, of the Statute of the Court in the proceedings on the request for advisory opinion concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, as also of the 30 sets of those documents in English, and 30 in French, whose dispatch your letter announced.

Note is further taken of the Secretary-General's readiness to submit any additional documentation deemed relevant by the Court.

16. LE CHEF DU SERVICE DU CONTENTIEUX DIPLOMATIQUE, DES TRAITÉS ET DES AFFAIRES LÉGISLATIVES DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES DE L'ITALIE

Rome, le 23 février 1985.

J'ai l'honneur, en me référant à votre lettre du 28 septembre 1984, de vous faire tenir ci-joint l'exposé écrit du Gouvernement italien au sujet de la requête pour avis consultatif transmise à la Cour par le Secrétaire général des Nations Unies en vertu de la décision du Comité des demandes de réformation de jugements du Tribunal administratif en date du 23 août 1984.

(Signé) Arnaldo SQUILLANTE.

17. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

26 February 1985.

I have the honour to transmit herewith a letter from the Secretary-General, addressed to the President of the International Court of Justice, authorizing me to present written statements on his behalf in the matter of the Advisory Opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

Pursuant to the above-mentioned authorization, I have the honour to transmit herewith for communication to the Court thirty copies of the written statement on behalf of the Secretary-General and thirty copies of a written statement setting forth the views of Mr. Yakimetz, the Applicant to whom the above-mentioned judgement of the Administrative Tribunal relates.

Thirty copies of French translations of the Secretary-General's written statement will be despatched under separate cover prior to 28 February and thirty copies of a French translation of the written statement of Mr. Yakimetz will follow shortly thereafter.

18. THE SECRETARY-GENERAL OF THE UNITED NATIONS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

26 February 1985.

I have the honour to inform you that I have designated Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, as the representative of the Secretary-General in the proceedings of the Court concerning the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

Mr. Fleischhauer is authorized to present written statements on behalf of the Secretary-General in the matter before the Court.

(Signed) Javier PÉREZ DE CUÉLLAR.

19. THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE TO THE REGISTRAR

26 February 1985.

I have the honor to refer to my letter dated 21 November 1984. Therein, I informed the Court that it was the intention of the United States to avail itself of the right conferred under Article 66 of the Statute of the Court to present its views concerning the request by the Committee on Applications for the Review of Administrative Tribunal Judgements for an advisory opinion with respect to Tribunal Judgement No. 333 *(Yakimetz)*. I refer also to the Court's Order of 30 November 1984 extending the time-limit for the submission of pleadings in this case until 28 February 1985.

The written statement of the Government of the United States of America concerning this case is attached hereto.

20. THE AMBASSADOR OF CANADA TO THE NETHERLANDS TO THE REGISTRAR

27 February 1985.

On behalf of Canada, I have the honour to send to the International Court of Justice the attached statement, in English and French, concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

(Signed) L. A. H. SMITH.

21. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DU GOUVERNEMENT DE L'ITALIE

27 février 1985.

J'ai l'honneur d'accuser réception de votre lettre du 23 février 1985 et de l'exposé écrit du Gouvernement italien au sujet de la requête pour avis consultatif transmise à la Cour par le Secrétaire général des Nations Unies en l'affaire de la *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies.*

22. THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

28 February 1985.

I have the honour to acknowledge receipt of your letter of 26 February 1985, by which you were good enough to inform me that you have designated Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, as your representative in the proceedings concerning the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

(Signed) NAGENDRA SINGH.

23. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

28 February 1985.

I have the honour to acknowledge receipt of your letter of 26 February 1985, transmitting a letter from the Secretary-General to the President of the Court, and transmitting also copies of the written statement on behalf of the Secretary-General in respect of the request for an advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, and copies of a written statement setting forth the views of the Applicant to whom that judgement of the Administrative Tribunal relates.

24. THE REGISTRAR TO THE AMBASSADOR OF CANADA TO THE NETHERLANDS

28 February 1985.

I have the honour to acknowledge receipt of your letter of 27 February 1985, with which Your Excellency was good enough to transmit to me the written statement of Canada concerning the request for advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

25. THE REGISTRAR TO THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE

28 February 1985.

I have the honour to acknowledge receipt of your letter of 26 February 1985, with which you were good enough to transmit to me the written statement of the United States of America concerning the request for advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

26. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

28 February 1985.

I have the honour to transmit a copy of a letter dated 25 February 1985 from Diana Boernstein Esq., Counsel for Mr. Yakimetz, in the matter of the Advisory Opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

Ms. Boernstein indicates that she will be on mission for the United Nations until 19 April and has requested me to seek that the Court extend until six weeks after that date the time-limit for submission of comments on written statements submitted in this matter.

It is noted that the Court previously extended, at the request of the United Nations, the time-limit for submission of written statements to 28 February 1985. The United Nations considers that it would not be prejudiced by the Court granting the present request in respect of time-limits for comments on written statements.

The Counsel for Mr. Yakimetz to the Legal Counsel of the United Nations

25 February 1985.

I leave on March 1 1985 on official mission to several countries in Asia. This mission was postponed from last October in order to meet the time-limit of 14 December 1984, fixed by the President of the Court, for submission of Written Statements, and it cannot be postponed again. I shall be away until April 19. I should therefore be grateful if you would request the Court to extend until six weeks after my return the time-limit for submission of Comments on the Written Statements.

Mr. Sylvanus Tiewul has kindly agreed to act as liaison in this case during my absence. Would you please send all relevant material to him for transmission to me.

(Signed) Diana BOERNSTEIN,
Counsel for Mr. Yakimetz.

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27. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

5 March 1985.

By letter of 28 February 1985 I had the honour to acknowledge the receipt of your letter dated 26 February 1985 whereby, pursuant to Article 66, paragraph 2, of the Statute of the International Court of Justice, you transmitted to me a written statement on behalf of the Secretary-General concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* on which an advisory opinion has been requested of the Court, together with the views of the Applicant to whom the Judgement relates.

I now have the honour to acknowledge receipt of your letter of 28 February 1985 forwarding a request, dated 25 February 1985, submitted by counsel for the Applicant, in respect of the time-limit for comments on written statements, and indicating that the United Nations considers that it would not be prejudiced by the granting of that request.

I have further to inform you that, within the extended time-limit of 28 February 1985 fixed by the President of the Court, the Governments of the Union of Soviet Socialist Republics, Italy, Canada and the United States of America also submitted written statements in the above-mentioned case, pursuant to Article 66, paragraph 2, of the Statute of the Court.

The texts of the above-mentioned statements in the language in which they were submitted, which you may wish to make available to counsel for Mr. Yakimetz, are hereby communicated to you pursuant to Article 66, paragraph 4 (last sentence), of the Court's Statute and Article 105, paragraph 1, of the Rules of Court. I shall not fail to send you, in due course, the corresponding translations prepared in the Registry. Your attention is drawn to the fact that the communicated statements have not yet been made available to the public by the Court.

I wish also to inform you that the President, pursuant to Article 66, paragraph 4 (first sentence), of the Court's Statute and Article 105, paragraph 2 *(a)*, of the Rules of Court, has decided to permit any State or organization having presented or transmitted a written statement to submit comments in writing on the statements made or transmitted by any other and has fixed 31 May 1985 as the time-limit for the submission of such comments.

The subsequent procedure having been reserved, I shall not fail to inform you in due course of such further decisions as may be taken by the Court in its regard.

28. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS [1]

5 March 1985.

By a letter of 28 September 1984 the Deputy-Registrar informed Your Excellency that the United Nations Committee on Applications for Review of Administrative Tribunal Judgements had requested an advisory opinion of the

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy and to the Ambassadors of Canada and the United States of America to the Netherlands.

International Court of Justice concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* and that the President of the Court had considered the United Nations and its member States as likely to be able to furnish information on the question. You were also informed, by the same letter, that 14 December 1984 had been fixed as the time-limit for the submission of written statements and, by a letter of 30 November 1984, that that time-limit had been extended to 28 February 1985.

I now have the honour to inform you that, within the time-limit as thus extended, the United Nations submitted to the Court a written statement, comprising a statement on behalf of the Secretary-General and the views of the person to whom Judgement No. 333 of the Administrative Tribunal related, namely Mr. Vladimir Yakimetz, and that, in addition to the Government of the Union of Soviet Socialist Republics, those of Italy, Canada and the United States of America submitted written statements.

The texts of the above statements in the language in which they were submitted are hereby communicated to your Government pursuant to Article 66, paragraph 4 (last sentence), of the Court's Statute and Article 105, paragraph 1, of the Rules of Court. I shall not fail to make available in due course to your Government the corresponding translations. I am also enclosing the Introductory Note with which the Secretary-General of the United Nations has prefaced the dossier of documents likely to throw light upon the question on which an opinion is required (Statute, Art. 65, para. 2) and the table of contents of that dossier. Your kind attention is further drawn to the fact that the said statements and documents communicated to your Government have not yet been made available to the public by the Court.

I also have the honour to inform you that the President, pursuant to Article 66, paragraph 4 (first sentence), of the Court's Statute and Article 105, paragraph 2 *(a)*, of the Rules of Court, has decided to permit any State or organization having presented or transmitted a written statement to submit comments in writing on the statement made or transmitted by any other and has fixed 31 May 1985 as the time-limit for the submission of such comments.

The subsequent procedure having been reserved, I shall not fail to inform you in due course of such decision as the Court may take in the matter.

29. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

8 March 1985.

I have the honour to acknowledge receipt of thirty copies of the French translation of the written statement submitted on behalf of the Secretary-General and of thirty copies of the French translation of the statement setting forth the views of Mr. Yakimetz in the matter of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, which were received in the Registry on 1 and 8 March 1985, respectively.

30. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

17 April 1985.

In my letter of 5 March 1985 on the subject of the written statements filed in the case concerning an *Application for Review of Judgement No. 333 of the*

United Nations Administrative Tribunal I undertook to furnish you in due course with corresponding translations.

I have accordingly the honour to transmit to you herewith copies of an English translation of the written statement of Italy together with French translations of those filed respectively by the Union of Soviet Socialist Republics and by the United States of America. I would emphasize that these translations, prepared by the Registry for the use of Members of the Court, have no official character whatever. I should further recall that the written statement of Canada transmitted to you with the aforementioned letter was submitted in both English and French.

It will be recalled that the President of the Court has fixed 31 May 1985 as the time-limit for the submission of comments in writing on the statements made or transmitted by any State or organization. In that connection I would be grateful if you would kindly forward a copy of each translation to counsel for Mr. Yakimetz.

31. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS [1]

17 April 1985.

In my letter of 5 March 1985 on the subject of the written statements filed in the case concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* I undertook to furnish Your Excellency in due course with corresponding translations.

I have accordingly the honour to transmit to you herewith copies of an English translation of the written statement of Italy together with French translations of those filed respectively by the Union of Soviet Socialist Republics and by the United States of America. I would emphasize that these translations, prepared by the Registry for the use of Members of the Court, have no official character whatever. I should further recall that the written statement of Canada transmitted to you with the aforementioned letter was submitted in both English and French.

Also transmitted with that letter were the English versions of the written statement of the Secretary-General of the United Nations (enclosing also a statement presented on behalf of the Applicant), and of the Introductory Note with which he had prefaced the dossier of documents likely to throw light upon the question on which an opinion is required (Statute, Art. 65, para. 2). I now take the opportunity of forwarding to you, in addition to the above-mentioned translations, the French versions of those documents.

It will be recalled that the President of the Court has fixed 31 May 1985 as the time-limit for the submission of comments in writing on the statements made or transmitted by any State or organization.

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy and to the Ambassadors of Canada and the United States of America to the Netherlands.

32. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

3 May 1985.

I have the honour to refer to your letter of 17 April 1985 which recalled that the President of the Court has fixed 31 May 1985 as the time-limit for the submission of comments in writing on the statements made by any State or organization in the case concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

I have the honour to transmit to the Court a copy of a letter dated 26 April 1985, which I received on 1 May 1985, from Diana Boernstein, Esq., Counsel for Mr. Yakimetz, which requests that the time-limit for submitting comments be extended to the end of June because she has received a priority assignment concerning the African Drought Emergency. We would have no objections to the President favourably considering this request for an extension of the time-limit.

The Counsel for Mr. Yakimetz to the Legal Counsel of the United Nations

26 April 1985.

Application for Review of Judgement No. 333
of the United Nations Administrative Tribunal

I acknowledge the receipt, upon my return from Asia on April 22nd, of the written statements submitted pursuant to Article 66, paragraph 2, of the Statute of the Court in the above-named case. Two other sets of statements, forwarded to me in Rangoon and in Manila, failed to reach me. I note also that the President has set the time-limit for comments on the written statements as May 31, 1985.

With the consent of the Applicant, Mr. Yakimetz, and with regret, I would like to seek a further extension of the time-limit for submitting comments until the end of June. The reason for this request is a priority assignment concerning the African Drought Emergency. I understand that the Court's calendar is in any case very full at present, and therefore I believe that this further extension will not delay the consideration of the case.

33. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

(telex)

9 May 1985.

Have honour inform you that following Ms. Boernstein's letter, and noting absence of objection on part of Secretary-General, President of Court has extended time-limit under Article 66 (4) of Statute to Monday, 1 July 1985. A formal letter in this sense is being sent to Secretary-General and States concerned.

34. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

9 May 1985.

With reference to the advisory proceedings on an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, I have the honour to acknowledge receipt of your communication of 3 May 1985 transmitting a copy of a letter dated 26 April 1985 by which counsel for Mr. Yakimetz seeks an extension of time-limit, and indicating that the Secretary-General would have no objection to such an extension.

I am to inform you, accordingly, that the President of the Court, after consideration, has extended from 31 May 1985 to 1 July 1985 the time-limit within which States or organizations having presented or transmitted written statements may submit written comments on any written statement presented or transmitted by any other. I shall be grateful if you will kindly convey this decision to counsel for Mr. Yakimetz.

The subsequent procedure remaining reserved, I shall not fail to inform you of such further decisions as may be taken in the proceedings.

35. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS[1]

9 May 1985.

With reference to the advisory proceedings on an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, and further to my letters of 5 March and 17 April 1985, I have the honour to inform you that the President of the Court has extended from 31 May to 1 July 1985 the time-limit within which any State or organization having presented or transmitted a written statement may, pursuant to Article 66, paragraph 4, of the Statute, submit comments in writing on the statement made or transmitted by any other.

The President has taken this action following the receipt from the Secretary-General of a letter transmitting another in which a wish for such extension is expressed by counsel for the person to whom the above-mentioned Judgement No. 333 relates, and indicating that the Secretary-General would have no objection.

The subsequent procedure having been reserved, I shall not fail to inform you in due course of such further decisions as may be taken in the proceedings.

36. THE AMBASSADOR OF CANADA TO THE NETHERLANDS TO THE REGISTRAR

30 May 1985.

I refer to your letter of 9 May 1985, concerning the advisory proceedings on an *Application for Review of Judgement No. 333 of the United Nations*

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy and to the Ambassadors of Canada and the United States of America to the Netherlands.

Administrative Tribunal. I have been asked to inform you that Canada does not intend to submit another written communication on this matter. The Canadian Government would appreciate receiving copies, in due course, of any further submission on this subject which might be sent to the Court.

37. THE REGISTRAR TO THE AMBASSADOR OF CANADA TO THE NETHERLANDS

6 June 1985.

I have the honour to acknowledge receipt of the letter of 30 May 1985 whereby your Excellency has been good enough to inform me that Canada does not intend to submit any further written communication on the subject of the advisory proceedings concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

I shall not fail to keep the Canadian Government informed of the subsequent procedure in this case and, in particular, to transmit to it copies of any further submissions therein made, as you request.

38. THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE TO THE REGISTRAR

27 June 1985.

I have the honor to refer to your letter to Ambassador Bremer of 5 March 1985, in which you communicated the decision of the President of the Court to invite comments on the statements submitted by States and interested parties regarding the request by the Committee on Applications for the Review of Administrative Tribunal Judgements for an advisory opinion with respect to Tribunal Judgement No. 333 *(Yakimetz).* I also refer to the Court's subsequent order extending the time-limit for the submission of comments to 1 July 1985.

The comments of the United States of America are enclosed.

(Signed) Abraham D. SOFAER.

39. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

28 June 1985.

With reference to the advisory proceedings on an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, and in respect of your letters dated 5 March and 9 May 1985, I have the honour to advise that thirty (30) copies in English and French of comments on behalf of the Secretary-General and thirty (30) copies in the original languages (in part

English and in part French) of comments on the part of the Applicant are being sent to you for transmission to the Court.

Thirty (30) copies of translations of the Applicant's comments will be dispatched as soon as possible.

40. THE FIRST SECRETARY TO THE LEGAL COUNSEL OF THE UNITED NATIONS

5 July 1985.

I have the honour to acknowledge receipt with thanks of your letter of 28 June 1985 concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, and to confirm also receipt of the 30 copies of the comments on behalf of the Secretary-General and of the comments on the part of the Applicant. I note that translations of the latter document will be dispatched as soon as possible.

41. THE FIRST SECRETARY TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

8 July 1985.

I have the honour to transmit to Your Excellency herewith two copies of the written statements submitted by the Government of the United States of America, in accordance with Article 66, paragraph 4, of the Statute of the Court, in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, one copy of which you may wish to make available to counsel for Mr. Yakimetz.

42. THE FIRST SECRETARY TO THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE

8 July 1985.

I have the honour to acknowledge receipt of your letter of 27 June 1985, transmitting the written comments of the Government of the United States on the written statements submitted to the Court pursuant to Article 66, paragraph 2, of the Statute of the Court in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

I now have the honour to transmit to you herewith copies of the written comments made under Article 66, paragraph 4, of the Statute on behalf of the Secretary-General of the United Nations, including comments by Mr. Vladimir Yakimetz, the person to whom Administrative Tribunal Judgement No. 333 related.

These comments are transmitted in the language in which they were submitted to the Court; I shall not fail to make available to your Government in due course the corresponding translations.

The subsequent procedure in the case remains reserved.

43. THE FIRST SECRETARY TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS [1]

8 July 1985.

I have the honour to refer to the Registrar's letter of 5 March 1985, with which were transmitted to Your Excellency copies of the written statements submitted to the Court pursuant to Article 66, paragraph 2, of the Statute of the Court in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.* In that letter mention was made of the time-limit fixed for comments in writing on such written statements, pursuant to Article 66, paragraph 4, of the Statute, and by a letter of 9 May 1985 the Registrar informed you of the extension of that time-limit to 1 July 1985.

I now have the honour to transmit to Your Excellency herewith copies of the written comments made on behalf of the Secretary-General of the United Nations, including comments by Mr. Vladimir Yakimetz, the person to whom Administrative Tribunal Judgement No. 333 related, and the written comments of the Government of the United States of America.

These comments are transmitted in the language in which they were submitted to the Court; I shall not fail to make available to your Government in due course the corresponding translations.

The subsequent procedure in the case remains reserved.

44. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS [2]

19 July 1985.

With reference to the Registry's letter of 8 July 1985, transmitting to you the written comments submitted pursuant to Article 66, paragraph 4, of the Statute of the Court in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, I now have the honour to transmit to Your Excellency herewith the French translation, prepared by the Registry, of the comments of the Government of the United States of America.

45. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

25 July 1985.

With reference to the Registry's letter of 8 July 1985, transmitting the written comments submitted pursuant to Article 66, paragraph 4, of the Statute of the Court in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, I now have the honour to transmit to you herewith two copies of the French translation, prepared by the Registry, of the comments of the Government of the United States of America. You may wish to make available one copy to counsel for Mr. Yakimetz.

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy and to the Ambassador of Canada to the Netherlands.

[2] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and to the Ambassador of Canada to the Netherlands.

46. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

2 August 1985.

I have the honour to acknowledge receipt with thanks of 34 copies of the translations of the comments submitted by the Applicant, Mr. Vladimir Yakimetz, in the case concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

47. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS[1]

2 August 1985.

Further to the Registry's letter of 8 July 1985, I have the honour to transmit to Your Excellency herewith the translations, provided by the United Nations Secretariat, of the written comments submitted by Mr. Vladimir Yakimetz in the case concerning the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

48. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

4 March 1986.

I have the honour to transmit herewith copy of a communication dated 26 February 1986 from the Counsel for Applicant in *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

The Counsel for Mr. Yakimetz to the Legal Counsel of the United Nations

26 February 1986.

Mr. Vladimir Yakimetz attached, as Annex B to his comments on the written statements submitted to the International Court of Justice in his case, an analysis by Professor Alain Pellet at the request of the Co-ordinating Committee for Independent Staff Unions and Associations of the United Nations system. Professor Pellet's analysis was submitted in French, and an English version was subsequently prepared by the United Nations for transmittal to the International Court.

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and the Ambassador of Canada to the Netherlands.

Professor Pellet, due to pressure of work, was not immediately able to check the English translation to make sure it accurately represented his text. He has now done so. He apologizes for the delay, and requests that the attached list of corrigenda [1] be submitted to the Court.

LEGAL OPINION

by Alain Pellet, on the validity of Judgement No. 333 of the Administrative Tribunal of the United Nations with respect to the Charter of the United Nations and the fundamental principles of international civil service law.

Corrigenda [1]

p. 5, line 1.	"It must also be noted" *should read*: "*On the other hand,* it must be noted . . ."
p. 9, line 6.	"Not without taking precautions can this definition be transposed . . ." *should read*: "This definition *can be* transposed, *though not without precautions*, . . ."
p. 9, para. 12, 3 lines before end of page	". . . it has erroneously substituted a competence residing in . . ." *should read*: ". . . it has erroneously *admitted that the Secretary-General could surrender* the discretionary power . . ." [2]
p. 11, 4 lines before end of page	". . . and especially as the second sentence" *should read*: ". . . *although* the second sentence"
p. 12, para. 15, line 5	". . . erroneously substituted a competence connected with . . ." *should read*: ". . . erroneously *surrendered* the discretionary power available to him . . ." [3]
p. 20, para. 22, lines 4 to 6	". . . or whether, as seems to be admitted . . .; or whether this reasoning constitutes support of the finding and is analysed to be . . ." *should read* ". . . *either*, as seems to be admitted . . .; *or* this reasoning constitutes support of the finding and must be analysed to be . . ."
p. 20, para. 23, line 11	". . . elsewhere but . . ." *should read*: ". . . elsewhere. But . . ."

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[1] These corrections have been incorporated into the text. *[Note by the Registry.]*

[2] « Il a ainsi substitué, à tort, une compétence liée au pouvoir discrétionnaire dont il dispose. »

[3] « Le Tribunal a substitué, à tort, une compétence liée au pouvoir discrétionnaire reconnu par la Charte dans ce domaine au Secrétaire général. » L'expression « compétence liée » ne semble pas avoir d'équivalent en anglais.

49. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

7 April 1986.

I have the honour to acknowledge the transmission, with your letter of 4 March 1986, of a communication dated 26 February 1986 from the Counsel for the Applicant in the advisory proceedings on an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

50. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS [1]

3 November 1986.

With reference to the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, I have the honour to inform you that the Court has decided not to hold any public sitting for the purposes of hearing oral statements in the case.

51. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN [2]

4 novembre 1986.

Le 28 septembre 1984, le Greffier adjoint vous a adressé une lettre, qui constituait la communication spéciale et directe visée à l'article 66, paragraphe 2, du Statut de la Cour, au sujet de l'avis consultatif qui a été requis de la Cour dans l'affaire de la *Demande de réformation du jugement nº 333 du Tribunal administratif des Nations Unies.* Par cette lettre, vous avez été informé que l'Organisation des Nations Unies et ses Etats Membres avaient été jugés par le Président de la Cour susceptibles de fournir des renseignements sur la question et que, par ordonnance en date du 13 septembre 1984, le Président avait fixé au 14 décembre 1984 la date d'expiration du délai pour le dépôt d'exposés écrits. Ultérieurement, par une lettre du 30 novembre 1984, je vous ai informé que ce délai avait été prorogé par le Président au 28 février 1985.

J'ai l'honneur de vous informer maintenant que le Président a ensuite décidé, conformément à l'article 66, paragraphe 4 (première phrase), du Statut de la Cour et à l'article 105, paragraphe 2 *a)*, du Règlement de la Cour, d'admettre tout Etat ou toute organisation ayant présenté ou transmis un exposé écrit à soumettre, avant le 31 mai 1985, des observations écrites sur tout exposé présenté ou transmis par un autre Etat ou une autre organisation; plus tard, le Président a prorogé ce délai au 1er juillet 1985.

Enfin, je dois vous aviser que, comme l'y autorise l'article 105 de son Règlement, la Cour a décidé de ne pas tenir en l'espèce d'audiences publiques consacrées à des exposés oraux. En outre, conformément à l'article 106 de son Règlement, elle a décidé que les exposés écrits et les documents annexés ainsi que les observations écrites sur ces exposés seraient rendus accessibles aux Etats Membres de l'Organisation des Nations Unies mais non au public.

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[1] A communication in the same terms was also sent to the Minister for Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and to the Ambassadors of Canada and the Union of Soviet Socialist Republics to the Netherlands.

[2] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

En conséquence je vous envoie sous pli séparé des copies des exposés écrits reçus dans le délai prorogé au 28 février 1985, à savoir d'une part un exposé écrit présenté par l'Organisation des Nations Unies, lequel comprend un exposé rédigé au nom du Secrétaire général et un exposé des vues de M. Vladimir Yakimetz, personne que concerne le jugement n° 333 du Tribunal administratif des Nations Unies, et d'autre part des exposés écrits des Gouvernements du Canada, des Etats-Unis d'Amérique, de l'Italie et de l'Union des Républiques socialistes soviétiques.

Sous pli séparé je vous envoie aussi des copies des exposés écrits reçus dans le délai prorogé au 1^{er} juillet 1985, à savoir des exposés présentés au nom du Secrétaire général de l'Organisation des Nations Unies et de M. Yakimetz et un exposé du Gouvernement des Etats-Unis d'Amérique.

52. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR[1]

20 November 1986.

I refer to your letter of 23 October 1986 by which you advised me of apparent defects in paragraph 19 of the English version of the comments of the Applicant in the advisory proceedings on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.* You requested that the correct text of that paragraph be supplied to you and, in response to that request, I enclose a copy of a letter dated 11 November 1986 from Counsel for Applicant, together with which she transmitted to us a copy of the correct text.

The Counsel for Mr. Yakimetz to the Legal Counsel of the United Nations

11 November 1986.

I attach a copy of page 8 of the Comments of the Applicant in relation to the advisory proceedings on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, which contains part of paragraph 19. The last line of the page appears to have been omitted from the version sent to the International Court of Justice.

I would be grateful if you would transmit the corrected full page to the Court, and convey my apologies for not having noticed before that the line was missing from the text as reproduced.

53. THE REGISTRAR TO THE MINISTER FOR FOREIGN AFFAIRS OF ANTIGUA AND BARBUDA[1]

15 December 1986.

I have the honour to refer to my letter of 4 November 1986 in which I informed you that I was forwarding to you under separate cover copies of the written statements received by the Court, and of the written comments submitted on those statements on behalf of the Secretary-General of the United Nations and of Mr. Yakimetz, and by the Government of the United States of America, in respect of the request for an advisory opinion on the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

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[1] A communication in the same terms was also sent to the Minister of Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and to the Ambassador of Canada to the Netherlands.

The version originally supplied to the Court of one of those documents, "Comments of the Applicant Mr. Vladimir Yakimetz on the written statements submitted to the International Court of Justice in the matter of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*" was incomplete, one line of paragraph 19 having been omitted at the bottom of page 8. I am therefore forwarding to you herewith the corrected text of that page as transmitted by Counsel for the Applicant to the Legal Counsel of the United Nations, and supplied by the latter to the Court at my request.

54. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS[1]

23 December 1986.

I have the honour to refer to the letter of 8 July 1985 by which I transmitted to Your Excellency, *inter alia*, copies of the written comments of the applicant for review, as submitted by the Secretary-General of the United Nations in the case concerning an *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

In the version of those comments originally supplied to the Court, a line of text had been omitted at the foot of page 8. I therefore forward to you herewith the full text of that page as provided to the Legal Counsel of the United Nations and communicated to the Court at my request.

55. THE REGISTRAR TO THE LEGAL COUNSEL OF THE UNITED NATIONS

6 March 1987.

I have the honour to refer to the request for advisory opinion addressed to the Court by the Committee on Applications for Review of Administrative Tribunal on 28 August 1984 *(Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal)*, which is at present being examined by the Court, and to the Secretary-General's letter of 26 February 1985 designating you as his representative in these proceedings. For the purpose of that examination I am to ask the Secretary-General to supply certain background information to supplement that contained in the dossier of documents already submitted to the Court by him under Article 65, paragraph 2, of the Statute of the Court.

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[1] A similar communication was also sent to States who had received the English version of the comments of the Applicant Mr. Yakimetz on the written statements submitted to the International Court of Justice.

2

The information requested is as follows: taking into account the provision of United Nations Staff Regulation 4.4,

(1) What has so far been the practice with regard to the implementation within the Secretariat of the United Nations of paragraph 5 of section IV of resolution 37/126 adopted by the General Assembly on 17 December 1982?

(2) How many staff members within the Secretariat have so far received a career appointment in the light of the aforesaid paragraph?

(3) Of the Staff members referred to in the second question above, how many had been serving on secondment from *(a)* another international organization, *(b)* a national administration, prior to receiving a career appointment in the Secretariat?

(4) Can similar detailed information be given as to the practice prior to 1982 as to consideration of staff members on fixed-term appointment for career appointment, to supplement the background documentation in Part II of the dossier?

It would be appreciated if this information could be supplied to the Court as soon as conveniently possible.

56. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

22 April 1987.

I have the honour to refer to your letter of 6 March 1987 which requested certain information with regard to the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.* The questions and the answers to them are set out below.

Question 1

What has so far been the practice with regard to the implementation within the Secretariat of the United Nations of paragraph 5 of section IV of resolution 37/126 adopted by the General Assembly on 17 December 1982?

Answer

Resolution 37/126, section IV, paragraph 5, has, at least so far, not been transformed into a formal procedure for inclusion in the Staff Rules. It is, however, applied in that, in practice, staff members at the Professional and Principal Officer levels on fixed-term appointments receive before, or upon completion of five years of continuing good service, consideration for a career or another type of new appointment, as set out below:

Requests for new appointments are initiated by programme managers to ensure that the requirement of continuing good service is met; this is done normally in the context of the bi-annual review of fixed-term appointments. Cases are then examined on their own merits by the Office of Human Resources Management (OHRM: formerly the Office of Personnel Services) and when supported by the latter are submitted to the relevant appointment and promotion body for review and advice before a final decision is made by the Secretary-General or on his behalf. If the examination by OHRM leads to a negative result, the case is not referred to the appointment and promotion body. However, even in such situations, the matter may be considered by the Secretary-General himself. This happens rarely, but occurred in the case of Mr. Yakimetz: see paragraph 28 of the written statement submitted on behalf of the Secretary-General.

In this respect, attention is invited to the case of Mr. Liviu Bota who, after his secondment from the Romanian Government was not renewed in late 1986, received, upon consideration by the Secretary-General, a new fixed-term appointment.

Staff members assigned to posts subject to geographical distribution and whose countries are over-represented are equally eligible for career appointments but not before they have served continuously for at least five years on fixed-term appointments. This practice in effect removes, after five years, the bar that the over-representation factor otherwise presents to career appointments.

It has to be noted, however, that at present the reduction of staff as mandated by the General Assembly in view of the current financial crisis had led to a situation in which the conversion from fixed-term to career appointments has been considerably slowed down.

Question 2

How many staff members within the Secretariat have so far received a career appointment in the light of the aforesaid paragraph?

Answer

It would be difficult to answer this question within a reasonable period of time because statistics other than those generated by computer would have to be compiled manually by reviewing the records of the appointment and promotion bodies since 1982. Computer-generated statistics concerning staff whose fixed-term appointments have been converted into career appointments are, however, available only with respect to staff on board at present (the latest statistics refer to 31 January 1986) and do not show whether the conversion into career appointments took place before 1982 or after. Nevertheless, they are attached in Tables II *(a)* and II *(b)*. They indicate that of the 1,459 staff members on career appointments who were formerly on fixed-term appointments, some 1,214 (i.e. 83%), had periods of service of five years or less.

Question 3

Of the staff members referred to in the second question above, how many had been serving on secondment from *(a)* another international organization, *(b)* a national administration, prior to receiving a career appointment in the Secretariat?

Answer

There are no computer-generated statistics showing how many staff on career contracts were initially on fixed-term appointments on secondment from other international organizations. There are relatively few such officials.

Tables IV *(a)* and IV *(b)* provide statistics as of 31 January 1986 concerning staff on career appointments who previously held fixed-term appointments on secondment from a national administration. There were 16 such officials on board as of 31 January 1986. It should be noted in this context that, as recalled in the Answer to Question 1 above, Mr. Liviu Bota, whose secondment had expired, was thereupon given a fixed-term, rather than a career appointment; this case is, therefore, not included in the above figures.

TABLE I *(a)*. FIXED-TERM STAFF IN POST SUBJECT TO GEOGRAPHICAL DISTRIBUTION, BY REGION AND LENGTH OF SERVICE

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 5	134	125	292	162	61	44	112	7	937
6-10	31	31	10	24	10	9	20	1	136
11 +	19	9	4	24	12	4	8	1	81
TOTAL:	184	165	306	210	83	57	140	9	1 154

TABLE I *(b)*. FIXED-TERM STAFF IN POST SUBJECT TO GEOGRAPHICAL DISTRIBUTION, BY REGION AND LENGTH OF SERVICE

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 1	27	49	108	67	21	18	33	3	326
2	19	22	47	26	13	7	32	1	167
3	31	17	62	30	14	4	16	-	174
4	34	22	59	19	8	5	20	3	170
5	23	15	16	20	5	10	11	-	100
6	13	9	6	6	1	2	4	1	42
7	7	12	-	8	3	3	6	-	39
8	6	7	2	6	2	3	6	-	32
9	3	1	1	-	-	-	1	-	6
10	2	2	1	4	4	1	3	-	17
11 +	19	9	4	24	12	4	8	1	81
TOTAL:	184	165	306	210	83	57	140	9	1 154

TABLE II *(a)*. GEOGRAPHICAL STAFF ON CAREER CONTRACTS, BY REGION AND LENGTH OF SERVICE AS NON-CAREER

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 5	180	212	4	283	105	54	362	14	1 214
6-10	53	26	2	58	27	19	28	2	215
11 +	7	3	-	6	5	4	5	-	30
TOTAL:	240	241	6	347	137	77	395	16	1 459

TABLE II *(b)*. GEOGRAPHICAL STAFF ON CAREER CONTRACTS, BY REGION AND LENGTH OF SERVICE AS NON-CAREER

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 1	38	112	-	99	47	15	175	7	493
2	56	46	2	70	30	8	88	2	302
3	28	15	1	29	11	9	39	-	132
4	31	18	1	35	5	8	38	2	138
5	27	21	-	50	12	14	22	3	149
6	24	8	1	21	7	6	9	1	77
7	11	7	-	15	6	6	9	-	54
8	10	5	1	13	6	2	4	1	42
9	4	5	-	3	5	3	2	-	22
10	4	1	-	6	3	2	4	-	20
11 +	7	3	-	6	5	4	5	-	30
TOTAL:	240	241	6	347	137	77	395	16	1 459

READEX FICHE

TABLE III *(a)*. FIXED-TERM STAFF, in POST SUBJECT TO GEOGRAPHICAL DISTRIBUTION ON SECONDMENT FROM THEIR GOVERNMENT, BY REGION AND LENGTH OF SERVICE

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 5	9	31	292	16	4	2	11	–	365
6-10	9	12	10	6	–	–	2	–	39
11 +	7	1	4	9	2	2	2	–	27
TOTAL:	25	44	306	31	6	4	15	–	431

TABLE III *(b)*. FIXED-TERM STAFF IN POST SUBJECT TO GEOGRAPHICAL DISTRIBUTION ON SECONDMENT FROM THEIR GOVERNMENT, BY REGION AND LENGTH OF SERVICE

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 1	2	7	108	4	1	1	2	–	125
2	–	6	47	3	1	–	4	–	61
3	1	9	62	4	–	1	–	–	77
4	3	7	59	2	2	–	2	–	75
5	3	2	16	3	–	–	3	–	27
6	3	5	6	–	–	–	–	–	14
7	2	4	–	2	–	–	1	–	9
8	2	2	2	2	–	–	1	–	9
9	1	–	1	–	–	–	–	–	2
10	1	1	1	2	–	–	–	–	5
11 +	7	1	4	9	2	2	2	–	27
TOTAL:	25	44	306	31	6	4	15	–	431

TABLE IV *(a)*. GEOGRAPHICAL STAFF ON CAREER CONTRACTS PREVIOUSLY ON SECONDMENT FROM THEIR GOVERNMENT, BY REGION AND LENGTH OF SERVICE AS NON-CAREER

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 5	1	2	1	-	-	2	1	1	8
6-10	5	-	-	-	-	-	2	-	7
11 +	1	-	-	-	-	-	-	-	1
TOTAL:	7	2	1	-	-	2	3	1	16

TABLE IV *(b)*. GEOGRAPHICAL STAFF ON CAREER CONTRACTS, PREVIOUSLY ON SECONDMENT FROM THEIR GOVERNMENT, BY REGION AND LENGTH OF SERVICE AS NON-CAREER

(As of 31 January 1986)

Years of Service	*Africa*	*Asia and the Pacific*	*Europe (Eastern)*	*Europe (Western)*	*Latin America*	*Middle East*	*N. America and Caribbean*	*Others*	*Total*
up to 1	-	-	-	-	-	-	-	-	-
2	-	1	-	-	-	1	-	-	2
3	-	-	-	-	-	-	-	-	-
4	1	-	1	-	-	-	1	-	3
5	-	1	-	-	-	1	-	1	3
6	2	-	-	-	-	-	-	-	2
7	2	-	-	-	-	-	-	-	2
8	1	-	-	-	-	-	2	-	3
9	-	-	-	-	-	-	-	-	-
10	-	-	-	-	-	-	-	-	-
11 +	1	-	-	-	-	-	-	-	1
TOTAL:	7	2	1	-	-	2	3	1	16

Source: Planning and Information Section, Personnel Data Unit, OHRM, 23 March 1987.

Table III *(a)* shows, as of 31 January 1986, the number of staff on fixed-term appointments on secondment from national service and Table III *(b)* shows that 85% of these staff have served for less than five years.

Question 4

Can similar detailed information be given as to the practice prior to 1982 as to consideration of staff members on fixed-term appointment for career appointment, to supplement the background documentation in Part II of the dossier?

Answer

The figures given in Table II *(a)* and II *(b)* seem to indicate that even prior to the adoption of resolution 37/126 and the creation of a right to consideration, in actual practice the usual period for the conversion of fixed-term contracts into career appointments was, in the great majority of cases, less than five years.

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57. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS [1]

22 May 1987.

I have the honour to inform you, pursuant to Article 67 of the Statute of the Court and Article 108 of the Rules of Court, that a public sitting of the Court will be held on Wednesday 27 May 1987 at 3 p.m. for the purpose of delivering in open court the Advisory Opinion requested of the Court by the Committee on Application for Review of Administrative Tribunal Judgements in the case of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, in respect of which the Government of the Union of Soviet Socialist Republics filed a written statement pursuant to Article 66 of the Court's Statute.

(Signed) Eduardo VALENCIA-OSPINA.

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58. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

(telex)

25 May 1987.

I have the honour to inform you, pursuant to Article 67 of the Statute of the Court and Article 108 of the Rules of Court, that a public sitting of the Court will be held on Wednesday, 27 May 1987, at 3 p.m., for the purpose of delivering in open Court the Advisory Opinion requested of the Court by the Committee on Application for Review of Administrative Tribunal Judgements in the case of the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

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[1] A similar communication was also sent to the Minister for Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and the Ambassador of Canada to the Netherlands.

59. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

27 May 1987.

I have the honour to send you herewith five plain copies of the Advisory Opinion given today by the International Court of Justice in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

I shall have the pleasure of delivering to you in person the sealed copy of the Opinion referred to in Article 109 of the Rules of Court, when I arrive at Headquarters next week.

60. THE REGISTRAR TO THE AMBASSADOR OF THE UNION OF SOVIET SOCIALIST REPUBLICS TO THE NETHERLANDS[1]

27 May 1987.

I have the honour to send you herewith, in accordance with Article 109 of the Rules of Court, a copy of the Advisory Opinion given today by the International Court of Justice in the case concerning *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal.*

61. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[2]

12 août 1987.

Conformément à l'article 109 du Règlement de la Cour, le Greffier de la Cour internationale de Justice a l'honneur de transmettre sous ce pli un exemplaire de l'avis consultatif rendu par la Cour le 27 mai 1987 au sujet de la *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies.*

D'autres exemplaires seront expédiés ultérieurement par la voie ordinaire.

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[1] A similar communication was also sent to the Minister for Foreign Affairs of Italy, to the Legal Adviser of the United States Department of State and the Ambassador of Canada to the Netherlands.

[2] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

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